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### Public-Private Co-Enforcement Litigation

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## Article

# Public-Private Co-Enforcement Litigation

Stephanie Bornstein<sup>†</sup>

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## INTRODUCTION

Enforcement of civil public law is on a precipice. Federal statutes in the areas of discrimination, antitrust, securities, the workplace, education, consumer and environmental protection, and more include what are known as “hybrid” enforcement schemes.<sup>1</sup> Hybrid enforcement describes statutes in which Congress created both public and private mechanisms for enforcing the law by establishing both a federal government agency and a private right of action with incentives to encourage citizen litigation.<sup>2</sup> Since the creation of most hybrid statutes in the 1960s, federal government agencies and private plaintiffs’ attorneys have each played their part in litigating violations of civil public laws.<sup>3</sup> Over the past decade, however, each half of the hybrid enforcement equation has been slowly and consistently squeezed.

On the private side, procedural jurisprudence on pleading standards, class action doctrine, and mandatory arbitration have dramatically reshaped private enforcers’ access to the federal courts.<sup>4</sup> Meanwhile, on the public side, new levels of economic and political pressure on legislators and executive branch officials, exacerbated by recent jurisprudence on political contri-

1. See Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 687 (2013).

2. See *id.*

3. See *id.*

4. See *infra* Part II.A; see also, e.g., *Judicial Caseload Indicators - Federal Judicial Caseload Statistics 2018*, U.S. COURTS, <https://www.uscourts.gov/judicial-caseload-indicators-federal-judicial-caseload-statistics-2018> [https://perma.cc/FKY4-TA2X] (showing an 8.8% decline in civil cases filed in district courts between 2014 and 2018).

butions, have shifted the federal government somewhat irretrievably toward deregulation.<sup>5</sup> The hybrid systems written into our most important federal statutes, designed with two enforcement options to ensure that individuals' rights would be protected, are no longer able to function as Congress envisioned.

Over the past two decades, legal scholars have focused increasing attention on hybrid enforcement schemes in public law. A significant body of scholarship has now studied many aspects of each parallel track of hybrid models—for example, measuring the success of private incentives to litigate or theorizing optimal enforcement agency design.<sup>6</sup> Some scholars argue in favor of gov-

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5. See *infra* Part II.B; see also *Enforcement Annual Results Analysis and Trends for Fiscal Year 2017*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/enforcement/enforcement-annual-results-analysis-and-trends-fiscal-year-2017> [<https://perma.cc/A7LC-2USW>] (showing a nearly fifty percent drop in civil enforcement cases filed by the EPA, from 3,762 cases initiated in FY 2007 to 1,938 cases initiated in FY 2017); *EEOC Litigation Statistics, FY 1997 through FY 2017*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> [<https://perma.cc/4LXT-UVSN>] (showing a general trend of decline in litigation filed by the EEOC from 403 and 362 cases filed in FYs 2006 and 2007 to 114 and 201 cases filed in FYs 2016 and 2017).

6. See *infra* Part I.A. The literature on public and private enforcement mechanisms in U.S. civil law is vast. See generally JOHN C. COFFEE, *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL & FUTURE* (2015) [hereinafter COFFEE, *ENTREPRENEURIAL LITIGATION*]; SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION & PRIVATE LAWSUITS IN THE U.S.* (2010) [hereinafter FARHANG, *LITIGATION STATE*]; Burbank et al., *supra* note 1; Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983) [hereinafter Coffee, *Rescuing the Private AG*]; David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012) [hereinafter Engstrom, *Harnessing the Private AG*]; Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) [hereinafter Gilles, *Reinventing Structural Reform*]; Myriam Gilles, *Can John Coffee Rescue the Private Attorney General? Lessons from the Credit Card Wars*, 83 U. CHI. L. REV. 1001 (2016) [hereinafter Gilles, *Can Coffee Rescue?*]; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Conception*, 79 U. CHI. L. REV. 623 (2012) [hereinafter Gilles & Friedman, *After Class*];

ernment enforcement or public oversight of private plaintiffs' attorneys;<sup>7</sup> others prefer private litigation or view public enforcement bureaucracy as problematic.<sup>8</sup> For the most part, however, the scholarship reflects the reality that each enforcement path is separate. Articles examine or argue for the dominance of either public or private enforcement mechanisms, but start from the presumption that never the two shall meet.<sup>9</sup>

The leading thread of this scholarship arose in the mid-1980s, rooted in law and economics arguments that statutory incentives for private enforcement had been distorted by private class action attorneys who put their own profits before the interests of the clients they represented.<sup>10</sup> Concerns for abusive class actions sparked a movement of "litigation reform" that laid the

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Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006) [hereinafter Gilles & Friedman, *Exploding the Myth*]; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); David Marcus, *The Public Interest Class Action*, 104 GEO. L. J. 777 (2016); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004); Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425 (2019); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005).

7. See Clopton, *supra* note 6, at 287–88, nn.5–7 (citing, e.g., Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 375 (2014); Coffee, *Rescuing the Private AG*, *supra* note 6; Erichson, *supra* note 6; Rubenstein, *supra* note 6).

8. See Clopton, *supra* note 6, at 287–88, nn. 9–11 (citing, e.g., Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 906 (2014); William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1909 (2000); Selmi, *supra* note 6).

9. See Clopton, *supra* note 6, at 285 ("[S]ubstantial literature on private and public enforcement . . . typically treats government agencies and private attorneys general as substitutes rather than complements."); *id.* at 291 (describing public and private enforcement "as engaged in a zero-sum contest for enforcement jurisdiction"). The notable exception is Clopton's recent work on the benefits of "redundant" enforcement. See generally Clopton, *supra* note 6.

10. See generally Coffee, *Rescuing the Private AG*, *supra* note 6; *infra* Part II.A.

foundation for procedural restrictions on class action doctrine.<sup>11</sup> More recently, the fire of litigation reform spread, inspiring U.S. Supreme Court jurisprudence that has intensified pleading standards in federal courts and increasingly compelled mandatory arbitration to remove claims from federal courts entirely.<sup>12</sup> As a result, many scholars now fear that the pendulum has swung too far in the other direction, limiting access to federal courts for all, including those seeking crucial private enforcement of public law.<sup>13</sup>

Yet while scholars have warned of the consequences of procedural jurisprudence that limits private enforcement, they have largely missed a simultaneous pressure being exerted on the public side of hybrid enforcement regimes. The same deregulatory instincts that spawned limitations on private class actions have taken greater political hold, limiting federal agency budgets and threatening public enforcement, too.<sup>14</sup> Executive branch preferences have always varied between Democratic and Republican presidential administrations, leading to ebbs and flows in the level of monetary support for regulatory enforcement.<sup>15</sup> But recent U.S. Supreme Court jurisprudence affecting campaign financing has likely changed this natural progression.<sup>16</sup> The Court has now placed its thumb on the scale in favor of unlimited corporate campaign contributions and against labor union dues.<sup>17</sup> As a result, most legislators and executive branch appointees now likely feel intense pressure to limit public regulatory enforcement, at least for the foreseeable future.<sup>18</sup> If, as legal scholars have suggested, private enforcement litigation is “on the ropes,”<sup>19</sup> political and financial support for government regulatory enforcement may now be down for the count.

Both sides of hybrid public-private enforcement regimes are now so seriously constrained that weakened parallel enforcement efforts may no longer be enough to secure crucial public laws. This Article seeks to offer a new approach focusing on

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11. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* notes 203–05 and accompanying text.

14. *See infra* Part II.B.

15. *See infra* notes 254–67 and accompanying text.

16. *See infra* Part II.B.

17. *See infra* Part II.B.

18. *See infra* Part II.B.

19. Gilles & Friedman, *After Class*, *supra* note 6, at 658.

whether and how parallel enforcement tracks can merge to form points of super-hybrid “co-enforcement”:<sup>20</sup> public and private enforcement attorneys working together in a co-equal, collaborative fashion. The term “co-enforcement” was coined by political scientist and labor scholar Janice Fine and her colleagues to describe workers’ organizations and government enforcement agencies collaborating to better enforce labor law standards for vulnerable workers.<sup>21</sup> This Article looks to and adapts the concept to a wider swath of public-private enforcement partnerships, and does so in the context of litigation. It conceives of federal public agency and private plaintiffs’ attorneys working together to litigate jointly a variety of public law statutes. As such, the Article draws from the theoretical and empirical work of Fine and builds upon that of legal scholars of hybrid enforcement mechanisms to offer a pragmatic approach to resolve access to justice problems.

But this Article’s proposal is different from those of legal scholars who call for greater public oversight over private attorney “agents” to whom public enforcement work is delegated or outsourced by government “principals.”<sup>22</sup> Instead, it proposes co-counseling arrangements in which both parties collaborate as equals and fund their own efforts, not to correct the excesses of rent-seeking private attorneys general but rather to ensure access to justice for the public interest.<sup>23</sup> In doing so, this Article seeks to respond to two urgent challenges in the enforcement of civil laws that protect the public. On the one hand is a well-documented decline in private individuals’ access to the courts due

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20. As discussed *infra* notes 97–106 and accompanying text, the concept of “co-enforcement” is adapted from the work of Janice Fine and her colleagues, who coined the term to describe collaboration between workers’ organizations and government agencies responsible for labor law enforcement. See Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC’Y 359, 362–63 (2017) [hereinafter Fine, *Enforcing Labor Standards*]; Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships Between Government and Civil Society Are Showing the Way Forward*, 2017 U. CHI. LEGAL F. 143, 146–47 (2018), [hereinafter Fine, *New Approaches*]; see also Seema N. Patel & Catherine L. Fisk, *California Co-Enforcement Initiatives that Facilitate Worker Organizing*, 12 HARV. L. & POL’Y REV. ONLINE 1, 3–4 (2017).

21. See Fine, *New Approaches*, *supra* note 20; Fine, *Enforcing Labor Standards*, *supra* note 20; see also *infra* notes 97–106 and accompanying text.

22. See *infra* notes 107–17 and accompanying text.

23. See *infra* Part III.

to a decade of civil procedure jurisprudence that has intensified pleading requirements, narrowed class action rules, and increasingly embraced arbitration.<sup>24</sup> On the other is a challenge with which scholars have largely yet to grapple: a new level of financial and political pressure on legislators and the executive branch pushing directly away from public enforcement of civil laws and toward deregulation.<sup>25</sup>

While there are countless areas of overlap between civil law enforcement at both the state and federal levels, this Article focuses on one specific area ripe for coordination: federal statutes that authorize both a federal agency to enforce the statute against violators and individuals to enforce their own private rights of action for their injuries arising out of the same harms. This focus may include what are known as “citizen suits” or plaintiffs’ attorneys acting as “private attorneys general” where private litigation seeks to remedy both the plaintiffs’ own harm and deter violators.<sup>26</sup> But it excludes both “qui tam” suits in which individuals stand in the shoes of the government to enforce statutes for a bounty or reward and “parens patriae” suits in which the government stands in as a representative to redress the harms of its citizens.<sup>27</sup> While the latter involve crossover between public and private enforcement, they are beyond this Article’s focus on coordination in traditional hybrid federal statutory enforcement between agencies and individuals seeking to remedy the same harms through litigation for the purpose of effectively protecting the public.

This Article develops an argument grounded in both theory and necessity for merging public and private enforcement and considers the potential for applying such an approach trans-substantively to a variety of federal public laws.<sup>28</sup> Part I explores

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24. See *infra* Part II.A.

25. See *infra* Part II.B.

26. See Clopton, *supra* note 6, at 294.

27. See *id.*, at 293–95; *infra* Part I.B.1.

28. In a prior work, I documented how, in the five-year wake of the 2008 Great Recession, both public and private mechanisms for enforcing Title VII of the Civil Rights Act of 1964 became increasingly constrained, due to recessionary budget cuts on the public side and a “procedural recession” in private plaintiffs’ access to the federal courts. See Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL’Y REV. 119 (2014). I proposed a model for combining public and private Title VII enforcement and using administrative procedures under existing law more robustly—what I called “administrative antidiscrimination law.” See *id.*



the theoretical framework to support a co-enforcement litigation model. Is co-enforcement a sound idea in theory to meet our goals for how a public law enforcement system should be designed? It reviews political and economic theories that led to existing hybrid models, then applies those theories to integrated, rather than separate and parallel, enforcement. Part II makes the normative case for pursuing a collaborative approach. Even if co-enforcement is sound in theory, is a change to the status quo of hybrid enforcement necessary? It focuses on the need to integrate public and private enforcement forces due to recent economic, political, and jurisprudential constraints on both public and private enforcers. Part III provides a doctrinal and practical framework for how such points of co-enforcement could occur. If hybrid integration is a sound and necessary idea, how do we actually move toward co-enforcement? It looks at examples from statutes that authorize hybrid enforcement and proposes how to foster collaborative partnerships between related federal agencies and private plaintiffs' attorney enforcers.

Ultimately, the Article concludes, litigation reform and procedural jurisprudence have weakened private enforcement at the same time that a deregulatory fervor and new political pressures have weakened public enforcement. To ensure that critical public laws are enforced adequately may now require integrating both constrained halves of the parallel hybrid enforcement equation.

#### I. THEORETICAL BASIS FOR PUBLIC-PRIVATE CO-ENFORCEMENT

This Part provides the theoretical basis for a proposal of public-private co-enforcement of public law. It asks whether a co-enforcement approach is a good idea in theory given the goals behind existing hybrid enforcement design. It begins by defining "hybrid" enforcement for the purposes of this Article and highlighting existing scholarship on the political and economic theories that supported the development of hybrid enforcement schemes. It then considers what impact moving to integrated, rather than parallel and separate, enforcement would have on the same rationales, to provide a theoretical grounding for a co-enforcement approach. This Part concludes with a response to potential theory-based counterarguments.

## A. HYBRID ENFORCEMENT THEORY

Drawing on the work of several legal scholars, this Section provides an operational definition of “hybrid” public-private enforcement and highlights key political and economic rationales that gave rise to its development in U.S. law.

## 1. Defining “Hybrid” Enforcement

To propose a framework for combining the two halves of the existing “hybrid” enforcement scheme requires first defining “hybrid” enforcement. Public and private enforcement overlaps in a wide array of the American legal system in both state and federal law.<sup>29</sup> Several legal scholars have provided helpful taxonomies from which this Article draws.

In a recent work, Zachary Clopton traced the long history and wide reach of “redundant authority,” detailing “enforcement schemes in which public and private actors may maintain separate but overlapping suits seeking the same remedies for the same conduct” that may be “mutually preclusive.”<sup>30</sup> Clopton identified a continuum with three main categories.<sup>31</sup> On one end of the spectrum, he placed public actors seeking to enforce private rights—for example, *parens patriae* suits brought by state attorneys general on behalf of their citizens against tobacco, firearms, or asbestos manufacturers.<sup>32</sup> On the other end, he placed private actors seeking to enforce what seem like public rights—for example, *qui tam* suits under the False Claims Act brought by private citizens on behalf of the government against contractors engaged in fraud, for a share of the recovery.<sup>33</sup> Here, he also

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29. See Clopton, *supra* note 6, at 291 (identifying the “substantial and growing literature comparing public and private enforcement of law” and citing scholarship). Even focusing on only federal statutes that authorize private actors to sue, the field is vast. In a detailed study, Stephen Burbank, Sean Farhang, and Herbert Kritzer mapped 400 federal statutory enforcement schemes enacted between 1947 and 2002 and identified that nearly one-quarter (100) allowed for private enforcement and over twenty cases had “hybrid . . . regimes,” enacting private alongside government lawsuits or administrative actions. Burbank et al., *supra* note 1, at 685–87. Statutes allowing private enforcement of government policy, they noted, may reach “a virtually limitless array of policy areas,” including banking, discrimination, health and safety, the environment, and more. *Id.*

30. Clopton, *supra* note 6, at 290–92.

31. See *id.* at 292.

32. See *id.* at 290 & n.3.

33. See *id.* at 294–95. Note that, as Clopton explains, this may not be a

included “citizen suits,” in which a private party sues to ensure legal compliance and, sometimes, monetary damages—for example, suits to enforce voting rights, environmental or consumer protections, or other “common public rights.”<sup>34</sup> In a “grey area” between these two extremes, Clopton placed all other “hybrids” that provide injured parties with a private right of action running parallel to a government entity’s enforcement efforts under the same statute—for example, private class actions alongside government litigation in areas like antitrust, securities, housing, and employment.<sup>35</sup>

Other scholars focus on the role of the “private attorney general,”<sup>36</sup> where parties use their private rights of action to litigate violations of public law. In early and influential scholarship, John Coffee distinguished between two groups of private enforcers of public law—what he called the “ideological” and the “entrepreneurial” private attorneys general.<sup>37</sup> Coffee’s ideologues litigate mostly environmental, civil rights, and social justice matters, often spearheaded by public interest legal organizations, making them accountable to those organizations’ supporters.<sup>38</sup> The entrepreneurs, on the other hand—the “true ‘bounty hunter[s],’ motivated by . . . financial recovery . . . rather than . . . psychic income”—litigate mostly antitrust, securities, mass tort, and shareholder derivative cases.<sup>39</sup> This, Coffee argues, places them “beyond the control of the typically large and amorphous class of clients . . . [they] represent.”<sup>40</sup> Coffee’s analysis presented a cautionary tale focused on the potential harms

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“purely” private actor given the government’s ability to intervene: “Private parties may litigate these cases themselves, or the government may intervene and displace the private relator. Either way, the private party may share in the government’s recovery.” *Id.*

34. *See id.*

35. *See id.* at 295–98.

36. This term, coined by Appellate Court Judge Jerome Frank, first appeared in the 1943 case *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), but did not become popularly used until the 1970s. *See Coffee, Rescuing the Private AG, supra* note 6, at 215 n.1 (citing Frank’s opinion that “[s]uch persons, so authorized, are, so to speak, private Attorney Generals”); Rubenstein, *supra* note 6, at 2134–35.

37. *See Coffee, Rescuing the Private AG, supra* note 6, at 235.

38. *See id.* at 235–36.

39. *Id.* at 235.

40. *Id.*

of failing to restrain the entrepreneurial private attorney general. Yet, it also came with a prediction that financial pressures on public interest attorneys and incentives in large class actions may lead some ideological attorneys to “migrat[e]” toward entrepreneurialism.<sup>41</sup>

In another foundational work, William Rubenstein divided private attorneys general into three camps: those who act as a “substitute” for, as a “supplement” for, or as a “simulated” public attorney general.<sup>42</sup> Rubenstein’s “substitutes” include both bounty hunter-style private attorneys and those brought in by a public attorney general to litigate on the government’s behalf.<sup>43</sup> His “supplements” include private cases that contribute to the greater public interest—for example, environmental “citizen suits” in which, by seeking redress for citizens’ own injuries, private class action attorneys also advance public policy.<sup>44</sup> And Rubenstein’s “simulators” are attorneys acting for individual private clients whose behavior unintentionally benefits the public, through, for example, establishing a fund that benefits many, even if brought as an individual case.<sup>45</sup>

This Article’s proposal for public-private co-enforcement focuses on federal statutes that both authorize a government agency to litigate violations and give citizens a private right of action to sue for their own injuries arising out of the same harms. As such, on Clopton’s continuum of all public and private overlap, it includes his “hybrid” category of private attorneys general and some privately enforced “citizen suits” where clients suffer their own injuries.<sup>46</sup> But it excludes both privately enforced *qui tam* suits of non-injured parties in place of the government and publicly enforced *parens patriae* suits of state attorneys general in place of individuals. It, therefore, focuses on what Coffee identifies as “ideological” private attorneys general (and not those that are “entrepreneurial”),<sup>47</sup> and on what Rubenstein identifies as “supplemental” private attorneys general (and not those that

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41. See *id.* at 236. This, he correctly feared, could cause judicial “dissatisfaction,” resulting in “judicial winnowing of class and derivative actions, as courts impose more procedural and evidentiary hurdles on . . . plaintiff[s].” *Id.*

42. See Rubenstein, *supra* note 6, at 2143–46.

43. See *id.* at 2145–46.

44. See *id.* at 2147–49.

45. See *id.*

46. See Clopton, *supra* note 6, at 294.

47. See *supra* notes 36–41 and accompanying text.

are “substitutes” or “simulat[ors]”).<sup>48</sup> While other areas of overlap may be ripe for coordination, this Article’s proposal of co-enforcement litigation is aimed solely at those “hybrid” claims in which both private injured citizens and government enforcement agencies might choose to litigate the same claims against the same actors.

With this definition in mind, this Section turns now to the theoretical foundations for hybrid schemes, focusing on rationales drawn from political and economic theory.

## 2. Political Theory Rationales

The history of the enactment of hybrid federal statutory regimes in U.S. law illustrates the political theory behind a parallel public-private enforcement approach. As Stephen Burbank and his co-authors detail, federal statutes that encouraged private enforcement developed at several points throughout U.S. history, but reach a highpoint in the late twentieth century.<sup>49</sup> Between 1960 and 1980, two-and-a-half times as many such statutes passed as had been passed in the nearly one hundred years prior.<sup>50</sup> Originally coined in a 1943 court decision related to the New Deal, the term “private attorney general” did not gain prominence until the 1970s when a series of new statutes made attorneys’ fees available.<sup>51</sup> “Once loosed as a matter of money,” William Rubenstein notes, the spread of the private attorney general concept “was limited only by the imagination of lawyers seeking attorneys’ fees.”<sup>52</sup>

Scholars suggest several political rationales behind the rise of statutes conferring private rights of action. First, allowing both public and private actors to participate in law enforcement

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48. See *supra* notes 42–45 and accompanying text; see also Burbank et al., *supra* note 1, at 661 (distinguishing between hybrid regimes that are “complementary” (which this Article includes) and those that are “substitutionary” (which this Article does not include)).

49. See Burbank et al., *supra* note 1, at 644 (citing four points in history: the post-Civil War Reconstruction Era, the Progressive era at the turn of the century, the New Deal era after the Great Depression, and the Civil Rights era of the 1960s).

50. See *id.* (observing that seventy statutes passed between 1960 and 1979 as compared with twenty-eight between 1887 and 1959).

51. See Rubenstein, *supra* note 6, at 2134–35; see also Coffee, *Rescuing the Private AG*, *supra* note 6, at 215.

52. See Rubenstein, *supra* note 6, at 2136.

may help resolve distrust of government. As Burbank et al. suggest, legal systems and enforcement mechanisms reflect the preferences of those who create them, including key American values like “self-reliance, belief in the virtues of free market capitalism, . . . and distrust of government.”<sup>53</sup> Drawing on Robert Kagan’s work on “adversarial legalism,” Burbank et al., identify that political institutional structures—not some internal propensity toward litigiousness—helped spark hybrid enforcement regimes.<sup>54</sup> As they describe it, “[p]rivately-initiated litigation satisfies the impulse in favor of decentralized regulation,” while also reducing costs to the taxpayers who must foot the bill for government enforcement.<sup>55</sup>

Second, the development of hybrid enforcement schemes reflects power struggles between the separate branches of U.S. government. As extensively detailed by Sean Farhang and his co-authors, fragmented enforcement of federal statutes reflects concerns over which branch will maintain control over federal law.<sup>56</sup> In a political system of divided government, in which passing legislation is difficult and “the status quo [is] ‘sticky,’” Farhang et al. suggest that creating private enforcement instead of, or in addition to, federal agency enforcement helps preserve the enacting legislators’ preferences should party power in the legislature change.<sup>57</sup> It also preserves their preferences against competing preferences from the executive branch, administrative bureaucrats, or a politically appointed judiciary.<sup>58</sup> Privatizing at least some of the cost of new regulation may also help create

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53. See Burbank et al., *supra* note 1, at 645.

54. See *id.* at 644–46 (citing ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 9, 15–16, 34 (2001)).

55. See Burbank et al., *supra* note 1, at 645 (drawing on KAGAN, *supra* note 54).

56. See FARHANG, *LITIGATION STATE*, *supra* note 6, at 3–4, 31–34; Burbank et al., *supra* note 1, at 643, 646–48, 679, 691, 714; Burbank & Farhang, *supra* note 6, at 1547–50; Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 821–24 (2008); Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, 60 AM. J. POL. SCI. 401 (2016).

57. See FARHANG, *LITIGATION STATE*, *supra* note 6, at 3–4, 31–34; Burbank et al., *supra* note 1, at 643, 646–48, 679, 691, 714; Farhang & Yaver, *supra* note 56, at 401–04, 415.

58. See FARHANG, *LITIGATION STATE*, *supra* note 6, at 3–4, 31–34; Burbank et al., *supra* note 1, at 643, 646–48, 679, 691, 714; Farhang & Yaver, *supra* note 56, at 401–04, 415.

compromise needed to pass legislation in divided representative government.<sup>59</sup> For example, when enacting Title VII of the Civil Rights Act of 1964,<sup>60</sup> Burbank et al. suggest the Democratic-controlled Congress “self-conscious[ly] mobiliz[ed] . . . private lawsuits at the expense of administrative power” due to both a “fear of bureaucratic drift” and concerns over the cost of purely public means of implementation.<sup>61</sup>

Third, allowing private individuals to pursue litigation on behalf of the public serves democratic ideals by providing a forum for a range of public interests beyond the agency’s own agenda.<sup>62</sup> Myriam Gilles notes that, in hybrid schemes, private lawsuits “represent a democratic, participatory mechanism that affords concerned citizens a means to redress [public harms]” and have a voice in government decisions.<sup>63</sup> Involving more diverse participants in enforcement may also produce a greater and more reliable body of information on violations of the law.<sup>64</sup>

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59. See Burbank et al., *supra* note 1, at 679.

60. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e to e-17 (2012), is the main federal statute prohibiting race, sex, and other protected-class discrimination in employment.

61. See Burbank et al., *supra* note 1, at 691–94; see also Burbank & Farhang, *supra* note 6, at 1547–50. To overcome Southern Democrats’ opposition to the bill, Northern Democrats had to rely on moderate Republicans, who knew they had to respond to the Civil Rights crisis, but feared “overzealous” enforcement by the Kennedy/Johnson executive branch. The result: “conservative Republicans stripped the EEOC of the strong administrative powers initially proposed by advocates of the job discrimination title, and provided instead for private lawsuits with economic incentives for enforcement, including attorney fee awards for prevailing plaintiffs.” Burbank et al., *supra* note 1, at 692. Ironically, when government enforcement weakened during the Reagan administration yet the judiciary sided increasingly with plaintiffs, civil rights advocates changed their view to favor private litigation over government enforcement, moving to amend the statute with the Civil Rights Act of 1991, which “add[ed] new monetary damages and jury trial provisions with the express goal of increasing private enforcement.” *Id.* at 693–94.

62. See Burbank et al., *supra* note 1, at 662 (“[R]elative to administrative implementation, private enforcement regimes can . . . take advantage of private information to detect violations [and] . . . facilitate participatory and democratic governance.”); Farhang & Yaver, *supra* note 56, at 402–03; Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1417–30.

63. See Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1420–21 (citing ENVTL. POLICY DIV. OF THE CONG. RESEARCH SERV. OF THE LIBRARY OF CONG., 93D CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 819 (Comm. Print 1973)).

64. See Farhang & Yaver, *supra* note 56, at 402–03 (noting that more par-

Gilles describes this as a natural extension of the federal government seeking citizen help in law enforcement, “on the theory that . . . the citizenry[’s] millions of ‘eyes on the ground’ see far more than federal investigators ever could.”<sup>65</sup>

Yet despite their advantages from the perspective of political theory, overlapping enforcement schemes have also been subject to criticism due to their divided design. Where enforcement is split among government and private enforcers, each may look to the other creating a collective action problem that results in “shirking,” with neither party taking ultimate control or responsibility.<sup>66</sup> Because no one is in control, no one is accountable; this, in turn, may exacerbate public skepticism of government.<sup>67</sup>

Having two separate enforcers with two separate enforcement mechanisms can also lead to confusion, contradiction, and even dysfunction.<sup>68</sup> As Zachary Clopton has demonstrated, overlapping enforcement structures may wreak havoc in terms of legal procedural doctrine.<sup>69</sup> Agency and private litigation may occur simultaneously, with different aims and objectives; court

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participants can “cultivate the creation and use of valuable information and expertise, productively leverage distinctive forms of institutional capacity, and foster the representation of a wider range of groups and interests in the policymaking process”); *see also* Clopton, *supra* note 6, at 310 (“Redundancy also permits ‘perspectival aggregation,’ as agents may offer a diversity of problem-solving approaches. . . . [P]ublic and private enforcers likely differ in their access to information, expertise, and perspectives.”).

65. Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1429.

66. Clopton, *supra* note 6, at 311–12.

67. Farhang & Yaver, *supra* note 56, at 402, 404 (“Because fragmentation weakens control over policymaking by elected officials, it erodes the democratic accountability of policy makers.”); *see also* Burbank et al., *supra* note 1, at 667 (stating the argument that private enforcement “lack[s] democratic legitimacy and accountability”).

68. Farhang & Yaver, *supra* note 56, at 402 (explaining the argument that fragmentation “produces legal uncertainty, indeterminacy, and contradiction”); *see also* Burbank et al., *supra* note 1, at 667 (describing the arguments that “private enforcement regimes . . . produce inconsistent and contradictory doctrine from courts [and] weaken the administrative state’s capacity to articulate a coherent regulatory scheme”). *But see* Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1424–25 (suggesting that, in the context of police misconduct litigation, a private-only enforcement scheme “would . . . tap the experiential and financial resources of the citizenry, but in a manner that is [a] highly inefficient . . . patchwork of uncoordinated litigation efforts,” whereas a hybrid “deputation model aligns public and private interests in a fashion that encourages coordinated litigation strategies aimed at developing national standards”).

69. Clopton, *supra* note 6, at 328–29 (“Simultaneous suits risk duplicative



decisions and interpretations may contradict one another.<sup>70</sup> Simultaneous, separate litigation may create confusion over the preclusive effect of judgments by alternative enforcers.<sup>71</sup> This is a complex, context-specific problem for each hybrid enforcement scheme given that, as Clopton notes, “there is no universal template for rules on preclusion, damages, and claims processing that modulate public-private enforcement.”<sup>72</sup>

Thus, while statutes that create divided enforcement authority reflect American political norms<sup>73</sup> and an intentional design choice to balance power in the face of uncertain control,<sup>74</sup> they bring with them the attendant risks of conflict, confusion, and inertia.

### 3. Economic Theory Rationales

A separate, but related group of considerations for hybrid enforcement grows out of economic theory. The chief economic argument in favor of hybrid enforcement systems is that they increase overall enforcement of the law while also shifting the cost of the increase away from the public fisc.<sup>75</sup> In his germinal work on the private attorney general, John Coffee describes this advantage, noting that “the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence . . . by multiplying the total resources committed to the detection and prosecution of . . . prohibited behavior.”<sup>76</sup>

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work and lose out on beneficial aggregation. [They] also risk shirking, as both agents will prefer that the other makes costly investments in research. [And] if simultaneous litigation creates a race, it may discourage enforcers from sharing information, while encouraging them to cut corners, strike sweetheart deals, or engage in inefficient gamesmanship.”); *id.* at 299–306, 325–26, 328–29 (discussing further procedural challenges of overlapping regimes).

70. *See id.* at 299–306, 328–29.

71. *See id.* at 299–306, 325–26, 328–29.

72. *Id.* at 292.

73. *See* Burbank et al., *supra* note 1, at 645–46 (citing KAGAN, *supra* note 54).

74. *See id.* at 647–48, 713–14. As Farhang and Yaver explain, from the perspective of the executive branch, administrative structures may have become “more and more cumbersome, unwieldy, and hard to manage” because “[t]hey were, in part, intended to be so,” designed by “Congresses wishing to check subversion of legislative preferences by hostile executives.” Farhang & Yaver, *supra* note 56, at 415.

75. *See* Coffee, *Rescuing the Private AG*, *supra* note 6, at 218–25.

76. *Id.* at 218.

Enabling private enforcers to litigate was intended as a “necessary supplement” to public agency enforcement:<sup>77</sup> as Coffee explains, the “private attorney general is induced by the profit motive to seek out cases that otherwise might go undetected.”<sup>78</sup> A hybrid system that incentivizes private attorneys to pay up front for the cost of litigation with the promise of attorneys’ fees or a bounty reward provides added enforcement with no cost to cash-strapped public agencies.<sup>79</sup> Indeed, as Gilles suggests, reliance on private enforcement to supplement public agency budgets is now both assumed and expected.<sup>80</sup>

A second economic rationale for hybrid enforcement is that it fosters healthy competition that can lead to innovation and ensure robust enforcement.<sup>81</sup> Public and private enforcers competing for fines or damages may work harder and faster to beat each other to the punch in filing, and succeeding in, litigation.<sup>82</sup> The fact that Congress has created a private right of action to encourage enforcement of any particular statute also sends a message—as Burbank et al. describe it, a “clear and consistent signal that violations will be prosecuted,” which “insur[es] against the risk that a system of administrative implementation will be subverted.”<sup>83</sup> Clopton adds that redundant authority to

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77. *Id.* (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)).

78. *Id.* at 220.

79. See COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 219 (“[P]rivate enforcement of law through entrepreneurial litigation *does* litigate complex cases well (probably better than more resource-constrained public enforcers can do).”); Burbank et al., *supra* note 1, at 662 (noting arguments that “private enforcement regimes can . . . multiply resources devoted to prosecuting enforcement actions [and] shift the costs of regulation off of governmental budgets and onto the private sector”); Rubenstein, *supra* note 6, at 2149–50 (describing the view of “private attorneys general [as] a necessary supplement to government enforcement” given that “public attorneys may be fewer in number, underfunded, less skilled, or prone to political pressures”).

80. Gilles & Friedman, *After Class*, *supra* note 6, at 626 (noting that “[p]rivate involvement in public civil law enforcement is [so] deeply embedded in our politics and culture” that many agencies “are funded and organized on the clear, if largely unspoken, understanding that a vigorous and well-stocked private bar sits ready to deploy its ample resources to redress frauds and other harms perpetrated upon the general public”).

81. See Burbank et al., *supra* note 1, at 662 (“[P]rivate enforcement regimes can . . . encourage legal and policy innovation.”); Clopton, *supra* note 6, at 308–11; Rubenstein, *supra* note 6, at 2149–50.

82. See Clopton, *supra* note 6, at 308–11.

83. Burbank et al., *supra* note 1, at 662.

enforce public law prevents under-enforcement because having two parallel enforcers ensures that either will make up for the other's preferences or errors in selecting and prosecuting cases.<sup>84</sup>

Yet, as with political rationales, the same economic rationales that support hybrid enforcement also spark criticism. Hybridity compounds total resources spent on enforcement without additional public cost, but it may also lead to inefficient duplication.<sup>85</sup> As Clopton describes, a robust literature supports procedural "maximalism" opposed to redundancies across civil procedure, including in the context of public law enforcement.<sup>86</sup> Hybrid enforcement schemes may effectively protect against under-enforcement, but they also risk the opposite consequence of over-enforcement and "multiple punishments" against the same actors for the same behavior.<sup>87</sup> Coffee suggests that economists' concerns that hybrid enforcement leads to broad, "excess deterrence" may be overstated.<sup>88</sup> But while private lawsuits may not "broaden the scope" of enforcement, he notes, they may "intensify the penalty" instead.<sup>89</sup>

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84. Clopton, *supra* note 6, at 290, 308–11 ("Redundant public-private authority should mean that fewer good cases are missed . . . [R]edundant litigation may cure existing under-enforcement and deter future under-enforcement by allowing a second agent to fill the remedial gap . . .").

85. See *id.* at 288–90 (describing economic arguments against duplication); Coffee, *Rescuing the Private AG*, *supra* note 6, at 221 n.15 (describing further arguments).

86. Clopton, *supra* note 6, at 288 ("[T]he mere mention of duplication is met with resistance across a range of procedural contexts."); *id.* at 288–89 ("Modern civil procedure evinces a 'maximalist' preference against redundancy."); *id.* at 288 n.12 (citing and collecting studies).

87. *Id.* at 290 (describing that, while redundancy prevents under-enforcement, "redundant litigation [also] risks over-enforcement in the form of multiple punishments"); see Coffee, *Rescuing the Private AG*, *supra* note 6, at 220–21, 220 n.14.

88. Coffee, *Rescuing the Private AG*, *supra* note 6, at 220–25 (citing "available empirical evidence," which he acknowledges may be imperfect and incomplete, that follow-on private securities and antitrust cases filed after public enforcement actions did not significantly increase "the probability of detection"); see Gilles & Friedman, *Exploding the Myth*, *supra* note 6, at 155–59 (raising doubts that class-action lawsuits overdeter efficient behavior).

89. Coffee, *Rescuing the Private AG*, *supra* note 6, at 223; see Rubenstein, *supra* note 6, at 2151 ("The only supplemental function performed by this private attorney general is that of multiplying wrongdoers' penalties: she provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab."). Coffee acknowledges,

Another, and the most robust, economic criticism of hybrid enforcement is what Coffee and other law and economics scholars refer to as the “agency costs” caused by the disconnect between the financial interests of plaintiffs’ attorneys and the public interests of the clients they represent.<sup>90</sup> Because each plaintiff in a large securities, consumer, or antitrust class action will have a very small individual recovery, the class members may not be interested enough to exert control over the plaintiffs’ attorneys.<sup>91</sup> So unchecked, an opportunistic plaintiffs’ attorney becomes a “rent-seeking entrepreneur” who may settle the case in a way that meets the attorney’s own financial interest, leaving individual plaintiffs under-compensated.<sup>92</sup> Gilles has challenged the “agency costs” theory for its focus on individual class member compensation as the goal of private enforcement of public law

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however, that there may still be “social utility” in deep, rather than broad, enforcement. Coffee, *Rescuing the Private AG*, *supra* note 6, at 224–25 (“[F]ree riding’ by the private plaintiff on governmental enforcement efforts is by no means without social utility: . . . it does escalate the penalty structure . . . [and] may be more efficient for public agencies to concentrate on detection . . . and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics.”).

90. Gilles, *Can Coffee Rescue?*, *supra* note 6, at 1002–04 (citing and describing COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 117, 219); see Coffee, *Rescuing the Private AG*, *supra* note 6, at 218–19; Rubenstein, *supra* note 6, at 2140, 2161–65 (“Professor Coffee specifically, and law and economics scholars more generally, proposed rules that sought to reduce agency costs by ‘better align[ing] the interests of the plaintiff’s attorney’ with those of the class members she represented. So convincing was this solution that it became a virtual mantra of the class action literature in the 1990s . . .”). See generally Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3183–85 (2013), for a discussion of agency costs in class actions outside of the “securities and corporate governance” context.

91. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 884 (1987); Gilles, *Can Coffee Rescue?*, *supra* note 6, at 1003 (citing COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 117, 219) (“[P]rivate enforcement is ‘persistently misdirected’ by ‘fiduciary failure’—the structurally misaligned incentives that lead ‘plaintiff’s attorneys to settle cases in their own interest.’ . . . [A] corresponding detriment is that the named plaintiffs’ interests are too small to warrant any substantial investment in monitoring the lawyers.”); Gilles & Friedman, *Exploding the Myth*, *supra* note 6, at 113–16 (describing scholarly arguments regarding plaintiff incentives their article seeks to debunk).

92. Gilles & Friedman, *Exploding the Myth*, *supra* note 6, at 113–16.

rather than whether a class action lawsuit “causes the defendant-wrongdoer to internalize the social costs of its actions.”<sup>93</sup> Yet she, too, acknowledges the possibility of a problematic disconnect between class action attorneys and the class members they represent, a “tyranny paradox” inherent in litigation as an enforcement mechanism whereby a class action attorney’s settlement that benefits some or all class members also precludes the ability of others to sue for their own “better or different relief.”<sup>94</sup>

Thus, while hybrid systems allowing both public and private enforcement offer a way to increase and ensure robust enforcement without adding public costs, they bring with them attendant risks of duplication, excessive penalties, and straying from serving public goals through private litigation.

#### B. PUBLIC-PRIVATE CO-ENFORCEMENT THEORY

Having articulated the theoretical foundations for, and criticisms of, hybrid public-private enforcement of federal public law, this Section applies them to a proposal of public-private co-enforcement. What is lost—or gained—when applying the same political and economic rationales that support separate, parallel enforcement mechanisms instead to public and private enforcers litigating collaboratively on the same matters together? This Section argues that, while not a panacea, co-enforcement offers the promise of both maintaining the theory-based benefits of hybrid enforcement and overcoming some of its challenges. It first defines this Article’s proposal of “public-private co-enforcement” litigation. It then analyzes how integrating currently parallel public and private enforcement tracks would impact the political and economic theories that supported the development of existing hybrid systems.

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93. *Id.* at 104–05 (“[T]he so-called ‘agency cost’ problem is mostly a mirage. So far as the vast majority of small-claims class actions go, concerns with the undercompensation of absent class members are totally misplaced . . . All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions. Once this normative polestar is accepted, much of the recent literature on [agency costs in] class actions comes up for reexamination.”).

94. Gilles, *Can Coffee Rescue?*, *supra* note 6, at 1008. Gilles describes this concern as a “‘who the heck are you’ critique aimed at the class action lawyer’s self-appointed assumption of power.” *Id.* In the end, however, she perceives that this is not a uniquely private enforcer “interloper” problem, but rather a challenge of litigation as enforcement as compared to legislation. *See id.* at 1030–38.

### 1. Defining “Public-Private Co-Enforcement”

To apply the theoretical foundations underlying hybrid enforcement to a new concept requires first defining the proposed concept. A “public-private co-enforcement” scheme as envisioned by this Article means both federal agency attorneys and private plaintiffs’ attorneys working in collaboration on litigation against the same violator for the same harms as, in effect, co-counsel. Co-enforcement would not usurp the independence of either public agency or private attorney enforcers, as nothing would require the parties to collaborate, or to refrain from separately pursuing an enforcement action, unless they agree to do so. The goal would be to develop mechanisms for coordinated litigation, particularly on complex or significant cases against important actors, for which combined resources could have the most deterrent impact on other potential violators. This integrated approach draws on insights from other scholars who have studied collaborative enforcement<sup>95</sup> and who have raised proposals for improving existing hybrid systems.<sup>96</sup> Yet it differs from most other proposals in that it does not seek to vest overarching enforcement authority in one enforcer or the other, instead arguing for a co-equal approach.

The term “co-enforcement” was coined by political scientist and labor scholar Janice Fine and her colleagues to describe collaboration by workers’ organizations and government agencies tasked with enforcing labor laws.<sup>97</sup> Fine’s work draws on insights from theories of “coproduction” of public services by both

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95. See *supra* note 6.

96. See *infra* notes 107–19 and accompanying text.

97. See, e.g., Matthew Amengual & Janice Fine, *Co-Enforcing Labor Standards: Unique Contributions of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 129, 129 (2017) (defining co-enforcement as the “on-going, coordinated efforts of state regulators and worker organizations to jointly produce labor standards enforcement”); Fine, *Enforcing Labor Standards*, *supra* note 20, at 361–63 (“Co-enforcement conceptualizes state capacity for enforcement as a process of negotiated interdependence between regulators and societal organizations.”); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnership with Workers’ Organizations*, 38 POL. & SOC’Y 552, 553 (2010) (calling for “workers’ organizations as well as firms to partner with the government to detect violators”); see also Fine, *New Approaches*, *supra* note 20, 146 n.13 (explaining that co-enforcement was “developed by Amengual and Fine” and “draws heavily upon Fine & Gordon”); Patel & Fisk, *supra* note 20, at 3–4 (explaining Fine and her collabora-

state and citizen,<sup>98</sup> “collaborative governance” between state agencies and stakeholder groups,<sup>99</sup> and “republican tripartism” to involve public interest groups in regulatory governance.<sup>100</sup> Fine proposes that, by engaging with workers’ centers and key nonprofit organizations, government agencies can overcome limited resources and worker distrust to ensure more effective enforcement of health and safety and wage and hour laws.<sup>101</sup> She conducted several empirical studies of “emerging models of co-enforcement,” including partnerships between organizations that serve vulnerable workers and government agencies responsible for enforcing labor laws in Austin, Los Angeles, and San Francisco.<sup>102</sup> Among the conclusions Fine drew from her studies is that co-enforcement efforts were most successful when the agencies and organizations “recognized each other’s unique capacities” and did not “attempt to substitute for one another,” and when “both ced[ed] some control . . . to collaborate.”<sup>103</sup> Fine also

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rator’s research and documenting an example of co-enforcement in San Francisco).

98. See, e.g., Fine, *Enforcing Labor Standards*, *supra* note 20, at 362 (citing Elinor Ostrom, *Crossing the Great Divide: Coproduction, Synergy, and Development*, 24 *WORLD DEV.* 1073 (1993); Anuradha Joshi & Mick Moore, *Institutionalized Coproduction: Unorthodox Public Service Delivery in Challenging Environments*, 40 *J. DEV. STUD.*, May 2006, at 32 (2004)); Fine, *New Approaches*, *supra* note 20, at 147–48 (same).

99. See, e.g., Fine, *Enforcing Labor Standards*, *supra* note 20, at 363 (citing Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 *J. PUB. ADMIN. RES. & THEORY* 543 (2008)); Fine, *New Approaches*, *supra* note 20, at 149 (same).

100. See, e.g., Fine, *Enforcing Labor Standards*, *supra* note 20, at 362 (citing Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 *L. & SOC. INQUIRY* 435 (1991)); Fine, *New Approaches*, *supra* note 20, at 148–49 (citing IAN AYRES & JOHN BRATHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 54–100 (1992)).

101. Fine, *New Approaches*, *supra* note 20, at 145–49; see Fine, *Enforcing Labor Standards*, *supra* note 20, at 361–65.

102. Fine, *Enforcing Labor Standards*, *supra* note 20, at 362, 367–82 (including a co-enforcement partnership with the federal Occupational Health and Safety Administration); see also Fine, *New Approaches*, *supra* note 20, at 158–71 (describing further studies including in Palmyra, Pennsylvania).

103. Fine, *Enforcing Labor Standards*, *supra* note 20, at 362; see also Fine, *New Approaches*, *supra* note 20, at 149–54. In addition, Fine noted that “[t]rust, adaptation, accountability and communication” between co-enforcers were key. *Id.* at 155.

noted that political support for collaborative enforcement was essential.<sup>104</sup>

Fine's model for labor standards co-enforcement is unique to its own context, and it places workers themselves, not just their representatives, in the center of the process.<sup>105</sup> Thus it is not directly applicable to a context focusing solely on attorneys' actions.<sup>106</sup> Yet Fine's work provides a helpful analogy—a way to conceptualize government and private actors, both of whom seek to enforce the same laws, working together. This Article proposes a version of “co-enforcement” for public law litigators: a merging of enforcement efforts between public agency attorneys and private plaintiffs' attorneys seeking to enforce the same public civil laws.

This Article also builds upon a separate line of scholarship that has focused on strengthening existing hybrid enforcement by placing greater or overarching authority on the public half of the hybrid enforcement scheme. Several scholars have considered bringing private attorneys under the direction of public agencies, either to increase public agency capacity or to curb profit-motivated plaintiffs' attorneys straying from their public purpose, or both.<sup>107</sup> In an early work, Myriam Gilles proposed creating a “public-private partnership” to supplement limited public capacity to pursue constitutional claims by “deputizing” private citizens to litigate police misconduct cases.<sup>108</sup> Gilles proposed authorizing the Attorney General to create an agency relationship between the executive branch and victims of unconstitutional policing in a “classic deputation scheme” that would

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104. Fine, *Enforcing Labor Standards*, *supra* note 20, at 363, 367, 379–80; *see also* Fine, *New Approaches*, *supra* note 20, at 156–58.

105. Fine, *Enforcing Labor Standards*, *supra* note 20, at 365–66 (“Agency leaders . . . must . . . believe that the full potential for enforcement cannot be achieved without including workers . . . and that doing so does not compromise their role.”).

106. However, public interest law centers, like Bet Tzedek Legal Services, played a role in some labor co-enforcement models Fine studied, *id.* at 373. And Fine observed that co-enforcement efforts with the California Department of Labor Standards Enforcement increased after the former leader of the Asian American Legal Defense Fund, Julie Su, was appointed to head the state agency, *id.* at 374–76; *see also* Patel & Fisk, *supra* note 20, at 17–18.

107. *See* Rubenstein, *supra* note 6, at 2163–64.

108. Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1387–88 (proposing a new private right of action in an area of law that currently lacks a hybrid enforcement scheme).



vest in the federal government the ultimate “power to quash” any related private lawsuit “at any stage.”<sup>109</sup>

Others have proposed a greater screening role for public agencies or public supervision of “entrepreneurial” private attorneys general to reduce the problem of “agency costs” in private enforcement.<sup>110</sup> David Freeman Engstrom has examined the “gatekeeping” role that public agencies play in allowing private attorneys to pursue enforcement litigation, suggesting stronger oversight with some coordination of private litigation by the public agency.<sup>111</sup> More expansively, John Coffee has proposed creating a “semi-private attorney general” in which the public agency more directly oversees private class action enforcement, yet without absolute veto power.<sup>112</sup> This would allow public enforcers to “harness” the “entrepreneurial energy of the plaintiff’s bar” to maximize enforcement capacity, while resolving the agency costs problem of profit-motivated private attorneys who

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109. *Id.* at 1387–88, 1417.

110. For arguments in favor of expanded public agency oversight, see, for example, COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6; Engstrom, *Agencies as Litigation Gatekeepers*, *supra* note 6; Stephenson, *supra* note 6. Alternatively, Adam Zimmerman and Margaret Lemos have suggested that public entities should, in their own enforcement efforts, consider adopting procedural protections required of private class action attorneys to better protect and serve individual public interests. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) [hereinafter Lemos, *Aggregate Litigation*] (addressing the lack of procedural rules guiding state attorney general aggregate suits); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011) (suggesting that, when compensating victims, agencies should adopt procedures similar to those guiding private class actions); see also Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014) (discussing the impact of financial incentives on public enforcement litigators); Adam S. Zimmerman & Michael D. Sant’Ambrogio, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 1992 (2012) (proposing that agencies adopt “aggregation procedures” for common claims to “promote more efficiency, consistency, and legal access”).

111. Engstrom, *Agencies as Litigation Gatekeepers*, *supra* note 6, at 695–712; see also David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013) (offering further analysis on how the gatekeeper theory works in practice).

112. COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 195, 219–35; see Gilles, *Can Coffee Rescue?*, *supra* note 6, at 1038.

are not accountable to any particular client.<sup>113</sup> Seeking to “rehabilitate” the concept of the private attorney general, Coffee suggests “an alliance under which the ‘gatekeeper’ agency retains the private firm . . . on a contingent fee basis” to conduct work on behalf—and under the supervision—of the public agency.<sup>114</sup>

On the other hand, scholars have suggested that public enforcers expand their own role or take on additional enforcement tasks to make up for constraints placed on private enforcement by over a decade of “litigation reform.”<sup>115</sup> In the wake of the Supreme Court’s jurisprudence limiting class actions, Gilles and Gary Friedman proposed that state governments use their *parens patriae* role to step in on behalf of citizen suits traditionally brought by private plaintiffs’ attorneys.<sup>116</sup> States could “represent the interests of their citizens in the very consumer, anti-trust, wage-and-hour, and other . . . staple[s] of class action practice” no longer readily available to private attorneys due to judicial hostility toward class certification and a rise in mandatory arbitration.<sup>117</sup> Still others have simply called for federal agencies to increase their proportion of systemic class-style enforcement actions to fill the gaps left by restrictions on private class actions.<sup>118</sup>

While each of these proposals aims to make use of hybrid mechanisms to improve enforcement outcomes, all require the public enforcer to take on an increased or supervisory position as principals over private plaintiff’s attorneys willing to be made

113. COFFEE, *ENTREPRENEURIAL LITIGATION*, *supra* note 6, at 174–75, 195, 219–35; *see also* Gilles, *Can Coffee Rescue?*, *supra* note 6, at 1038.

114. COFFEE, *ENTREPRENEURIAL LITIGATION*, *supra* note 6, at 227–28.

115. *See infra* Part II.A.3 (describing “litigation reform” efforts and their impact on private plaintiff’s attorneys’ enforcement lawsuits).

116. Gilles & Friedman, *After Class*, *supra* note 6, at 630–31, 668–72.

117. *Id.* Again, the additional work could then be contracted out to those private attorneys in a principal-agent relationship, with robust supervision and control by AGs over the lawsuits. *See id.* at 630 (“The active presence of a responsible elected official here, as both cocounsel and client, vanquishes the agency critique in our view. . . . Watchful supervisory control over the litigation will be critical.”).

118. *See, e.g.,* Angela D. Morrison, *Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87 (2013) (calling for greater systemic enforcement of Title VII by the Equal Employment Opportunity Commission in the wake of precedent limiting class certification); Joseph A. Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. 1343 (2014) (advancing a similar argument).

their agents.<sup>119</sup> This Article's proposal of public-private co-enforcement seeks to redress similar concerns of prior scholars, yet does so in a novel way that recognizes both the mounting limitations on public agency enforcers and the expertise and independence of private attorney enforcers. Like Gilles and Friedman's, this proposal seeks to ensure access to the courts for harmed individuals in the wake of case law limiting class actions and expanding arbitration, and it measures enforcement success in deterrent impact.<sup>120</sup> And like others, this proposal seeks to harness the financial resources of the private bar to bolster increased demand on government agency recourses.<sup>121</sup> Yet, while Coffee's proposal focuses on correcting the excesses and problems of "entrepreneurial" private attorneys general, this Article's approach focuses on both empowering the "ideological" private attorneys general and on protecting government agencies under deregulatory attack.<sup>122</sup>

Moreover, prior approaches focus on greater public agency control over private attorneys to whom the work is delegated or outsourced. Instead, this Article envisions co-equal, co-counsel-style collaboration rather than a principal-agent relationship—an equal partnership between public and private enforcers seeking redress for the same important harms. So constructed, a public-private co-enforcement scheme stands to maintain the benefits of a hybrid system, while resolving some of its theory-based challenges.

## 2. Political Theory Rationales

Returning to the political theories that supported hybrid enforcement design, a co-enforcement model may, in fact, better serve the rationales of keeping bureaucracy in check, balancing power in divided government, and ensuring democratic participation.<sup>123</sup> If private individuals are distrustful of government agencies, having a co-equal private partner may allow a more

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119. See Gilles & Friedman, *After Class*, *supra* note 6, at 630–31, 668–72.

120. See *infra* Part II.A.1.

121. See *infra* Part II.C.

122. See Coffee, *Rescuing the Private AG*, *supra* note 6, at 235; *infra* Part II.B.1.

123. See *supra* Part I.A.2.

direct watchdog that ensures agency accountability to the public.<sup>124</sup> If legislators are concerned that executive agencies will thwart their political power,<sup>125</sup> the legislators' constituents would actively participate in a co-equal co-enforcement scheme. And if the underlying goal of a divided enforcement system is to make sure that no one party has too much political power,<sup>126</sup> a co-enforcement partnership requires public and private enforcers to work together, which will necessitate compromise and balance.

A collaborative system would also enhance the goal of participatory, representative enforcement<sup>127</sup> because it would require agencies to listen to their private enforcement partners' perspectives. Moreover, instead of sharing information on litigation efforts by "signal" only—where one enforcer infers information from the other's independent actions<sup>128</sup>—enforcers would share and pool information directly, in real time, to enhance collective enforcement efforts.<sup>129</sup>

More importantly, a co-enforcement approach may avoid the political theory-based criticisms of hybrid systems by improving upon parallel, but redundant enforcement. If critics of redundant enforcement are concerned about a collective action problem or shirking,<sup>130</sup> co-enforcement requires internal and automatic accountability. Neither party can shirk without express knowledge by the other, who will then be motivated to hold the shirker responsible.<sup>131</sup>

If divided enforcement can lead to contradictory approaches or bureaucratic dysfunction,<sup>132</sup> for the portion of cases pursued through co-enforcement, both enforcers will have to agree on a

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124. See *supra* note 53 and accompanying text.

125. See *supra* notes 56–61 and accompanying text.

126. See *supra* notes 56–57 and accompanying text.

127. See *supra* notes 62–65 and accompanying text.

128. See Clopton, *supra* note 6, at 312 (citing and discussing literature on information "signaling").

129. Cf. *id.* ("[S]ometimes the relevant data will be complements, e.g., two pieces of information gain additional value when put together. In this circumstance, the incentive to gather each piece of information is increased rather than decreased.").

130. See *supra* notes 66–67 and accompanying text.

131. Cf. Clopton, *supra* note 6, at 311–12, 311 n.171 ("Shirking also is reduced if agents explicitly or implicitly coordinated, dividing the information space between them.").

132. See *supra* notes 68–72 and accompanying text.

unified approach to the case. Any disagreements between co-equal co-counsel that will, no doubt, arise, will have to be worked out and overcome within the context of each case.

A co-enforcement approach will also resolve any confusion about preclusion, multiple punishments, and other procedural challenges in parallel redundant litigation.<sup>133</sup> Instead of separate cases being pursued simultaneously in a race to the courthouse, both public and private enforcers will coordinate in ways that clearly establish and account for problems raised by possible future preclusion.

### 3. Economic Theory Rationales

Likewise, an integrated co-enforcement approach may equally serve economic rationales supporting parallel hybrid enforcement. If the primary economic benefit of redundant private enforcement is that it multiplies total resources on enforcement of public laws without requiring additional public funding,<sup>134</sup> co-enforcement should not change that equation. As described in Part III, private enforcers will still foot the bill for their own additional enforcement and seek reimbursement through contingent and attorneys' fees.<sup>135</sup> On the other hand, if enforcers are pursuing the same violators together, this could reduce the breadth of coverage provided by supplementing public with private resources.<sup>136</sup> Even so, that may not be a true loss. As John Coffee suggested, private resources do not necessarily produce greater breadth in detecting additional violators, but, instead, greater depth in "intensity" of penalties.<sup>137</sup> Given that, as described in Part II, each half of the hybrid enforcement equation has less force now than it did two decades ago,<sup>138</sup> combining efforts may make *better* use of existing limited resources. One intense, successful penalty from combined enforcement may be equally or more efficient deterrence than broader, shallow, or unsuccessful enforcement.

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133. See *supra* notes 30, 69–72 and accompanying text.

134. See *supra* notes 75–84 and accompanying text.

135. See *infra* Part III.B.

136. See *supra* notes 85–89 and accompanying text.

137. See *supra* notes 88–89 and accompanying text; see also Coffee, *Rescuing the Private AG*, *supra* note 6, at 220–25; Rubenstein, *supra* note 6, at 2140.

138. See *infra* Part II.

A co-enforcement approach may also serve the economic goal of creating competition to foster innovation in enforcement just as well as a hybrid approach.<sup>139</sup> While the competition would be removed for the portion of cases that are pursued collaboratively, the new approach would, itself, be innovative and likely spark new policy directions beyond any one piece of litigation. And because co-enforcement would not replace all parallel, hybrid enforcement, competition would still exist for the portion of cases each enforcer pursues independently.

A co-enforcement scheme may, however, be less effective than a hybrid “redundant” system’s ability at preventing under-enforcement.<sup>140</sup> At least for the portion of cases pursued collaboratively, enforcers would lose the advantage of each half of a parallel hybrid enforcement scheme filling in where the other made errors or biased decisions in case selection or approach.<sup>141</sup> Yet, again, what is lost in breadth of case selection may be counter-balanced by depth in prosecution—better, more effective, enforcement for those cases selected. Collaboration signals to defendant-violators that if their case is selected by a co-enforcement team, they are more likely to lose. Thus a decrease in the probability that any one violator will be targeted may be offset by an increase in the probability that, once targeted, a violator will be more likely to lose against more effective, combined enforcement.

Moreover, a co-enforcement approach may better overcome economic arguments *against* hybridity. Among the strongest economic criticisms of hybrid public-private enforcement is that it is anti-maximalist, inefficiently duplicative, and may lead to over-enforcement.<sup>142</sup> For the portion of “redundant” enforcement that is made collaborative, these concerns would be entirely resolved.<sup>143</sup> Rather than duplicating efforts, the two enforcers would combine them, resulting in one prosecution and punishment drawing equally on half of each set of resources.

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139. See *supra* notes 81–82 and accompanying text; Clopton, *supra* note 6, at 318–24.

140. See *supra* notes 83–84 and accompanying text.

141. See *id.*

142. See Clopton, *supra* note 6, at 308–09 (describing criticism); *supra* notes 85–89 and accompanying text.

143. See Clopton, *supra* note 6, at 328–31; *supra* notes 85–89 and accompanying text.

Most importantly, co-enforcement stands to dramatically reduce agency costs<sup>144</sup> in ways contemplated by previous scholarly proposals,<sup>145</sup> yet with important additional advantages: maintaining shared resources and valuing the independent authority of private enforcers. Rather than pulling private attorneys general entirely under the authority of public enforcers to curb their “rent-seeking” instincts,<sup>146</sup> a collaborative partnership may achieve a similar end while also recognizing the autonomy and added value of “ideological” private attorneys general.<sup>147</sup> Private class action attorneys, many of whom are sophisticated, successful, and effective advocates for private citizens, are not likely to jump at the chance to work under the thumb of a public agency and its limited resources and heavy bureaucracy.

While decades of law and economics scholarship has painted class action attorneys as clientless opportunists, a more recent and emerging literature by scholars including Adam Zimmerman and Margaret Lemos<sup>148</sup> has questioned the effectiveness of public entities in redressing private individuals’ harms after a large public enforcement suit. For example, Zimmerman has suggested that public agencies should adopt some of the procedural protections of private class actions to ensure fairness to the public in large-scale enforcement actions.<sup>149</sup> Indeed, as Clopton has documented, there are scholarly arguments critiquing private enforcement’s greedy excesses, and there are equally strong arguments critiquing public enforcement’s bureaucratic ineffectiveness.<sup>150</sup>

Rather than making one enforcer the dominant principal over the other, a co-equal collaborative design combines the benefits of both halves of the enforcement equation, with each providing a check on the other’s limitations, in a manner that

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144. See *supra* notes 90–94 and accompanying text.

145. See *supra* notes 107–17 and accompanying text (describing proposals by Gilles, Engstrom, Rubenstein, and Coffee).

146. See *supra* notes 10–11, 39–40, 92 and accompanying text.

147. See *supra* notes 36–38 and accompanying text.

148. See generally Lemos, *Aggregate Litigation*, *supra* note 110; Lemos & Minzner, *supra* note 110; Zimmerman, *supra* note 110; Zimmerman & Sant’Ambrogio, *supra* note 110.

149. See Zimmerman, *supra* note 110, at 556–72; see also Zimmerman & Sant’Ambrogio, *supra* note 110, at 2035–67.

150. See Clopton, *supra* note 6, at 288–89.

respects the talents and autonomy of each. So designed, a co-enforcement approach stands to serve many of the political and economic rationales that sparked hybrid enforcement design, while overcoming some of hybrid schemes' shortcomings.

### C. CHALLENGES FOR THE THEORETICAL BASIS

The political and economic theories supporting hybrid enforcement may support a move to co-enforcement, but a collaborative approach is not without its own challenges. This Section considers theory-based counterarguments to public-private co-enforcement, including that enforcers have differing roles and goals, the perception of agency bias, and the risk of removing useful redundancy.

The most immediate challenge to co-enforcement design is that public and private enforcers come from two different perspectives with differing roles and goals. Scholarship on hybrid systems regularly acknowledge that "public and private enforcers possess different preferences and interests."<sup>151</sup> Private plaintiffs' attorneys are presumed to be focused on collecting attorneys' fees or bounty rewards, with a fear of preclusion that may encourage settlement at the expense of the public interest.<sup>152</sup> Meanwhile, public agency attorneys are presumed to be focused on injunctive relief, motivated by making systemic change.<sup>153</sup> The "conventional story" assumes that enforcers' primary objectives point in opposite directions of compensation and deterrence, with private attorneys looking backward to individual damages and public attorneys looking forward to deterring future harm.<sup>154</sup>

Yet, as William Rubenstein suggests, this is an oversimplification;<sup>155</sup> although public and private enforcers' interests may not be perfectly aligned, there is significant overlap. Privately obtained damages (especially if punitive) spark deterrence, and publicly obtained fines and fees often compensate past injuries, such that, "in reality, both public and private lawyers pursue both deterrence and compensation."<sup>156</sup> Where Congress enacted

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151. See *id.* at 308 nn.149 & 152 (discussing and citing scholarship).

152. See *id.* at 321.

153. See *id.* at 326.

154. See Rubenstein, *supra* note 6, at 2140.

155. See *id.* at 2140–42.

156. See *id.*



statutes creating both federal agency enforcement and empowering private attorneys general, the intent was to maximize enforcement of the same statutory rights.<sup>157</sup> So while the *motivations* for pursuing actions may be slightly different, the *goal* of the effort to enforce is the same. Co-enforcement teams could focus on this shared overlap. To the extent the teams would have competing goals, they will have to compromise to succeed, which may benefit the public by enhancing ultimate penalties and reimbursement of enforcement costs. Public enforcers will ensure that private enforcers do not settle in ways that “sell out” the class; private enforcers will ensure that injunctive relief efforts are reimbursed and compensated for through attorneys’ or contingent fees.

A second counterargument against integrating public and private enforcement is the concern that the public enforcers could be susceptible to capture by private parties, or could show bias toward plaintiffs over defendants.<sup>158</sup> In the traditional concept of capture, government regulations or the way in which they are applied are “directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”<sup>159</sup> For example, a public agency might be impacted by the “influence of repeated interaction with the regulated industry” or by “campaign contributions, pressure on politicians, and . . . the ‘revolving door’” of specialized employees between industry and agency.<sup>160</sup>

Given that the coordination in a co-enforcement litigation scheme would include regulators and private attorneys, both of whom seek to enforce regulations against industry, traditional capture concerns are not implicated. Those regulated may, however, raise a valid concern about the perception of bias or favoritism toward plaintiffs’ attorneys with whom the agency works

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157. See *supra* notes 1–3, 49–52, 75–80 and accompanying text.

158. See, e.g., Gilles & Friedman, *After Class*, *supra* note 6, at 672–74.

159. See Daniel Carpenter & David A. Moss, *Introduction* to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1, 13 (Daniel Carpenter & David A. Moss eds., 2014).

160. See Carpenter & Moss, *supra* note 159, at 18–20. A discussion of regulatory capture is beyond the scope of this Article. For a discussion of the role public interest organizations may play in mitigating regulatory capture, see AYRES & BRATHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE*, *supra* note 100; Ayres & Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, *supra* note 100.

or who make political contributions that benefit the agency. Yet this issue should be less of a concern in a collaborative enforcement scheme than in the deputization schemes others have proposed in which public agencies outsource work to private plaintiff's attorneys.<sup>161</sup> Although federal public agency litigators could, technically, be helped by campaign contributions to the President who appointed and hired them, this influence is remote.<sup>162</sup> As described in Part III in a co-equal collaborative enforcement scheme, the plaintiffs' attorneys would not be contracted or paid by the federal agency; instead they would be reimbursed, as usual, from their own attorneys' or contingency fees, for their portion of the co-counseling that occurred. To the extent that an agency would be perceived as too pro-plaintiff, that perception would likely be no different for any agency that litigates to enforce the law against defendant violators, regardless of the presence of private co-counsel.<sup>163</sup>

A final counterargument to co-enforcement is that it may be *too* maximalist. Efficiency and reducing duplication of efforts and multiple punishments may be a laudable goal,<sup>164</sup> but, as Zachary Clopton argues, fragmented authority and redundant

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161. See *supra* notes 107–17 and accompanying text. For example, Gilles and Friedman raised similar concerns in their proposal that state attorneys general hire private attorneys to work on their increased *parens patriae* suits, citing criticisms raised when “state AGs hired well-known plaintiffs’ lawyers to sue . . . cigarette manufacturers.” See Gilles & Friedman, *After Class*, *supra* note 6, at 672. Gilles cautioned that “AGs should expect zero tolerance for ‘pay to play’ regimes in which campaign contributions are, or appear to be, reciprocated by contingent fee engagements.” *Id.* at 674.

162. And certainly far more remote than that of a financial contribution to the re-election campaign of the state attorney general litigating alongside private attorneys. See *supra* note 161.

163. See, e.g., Fine, *Enforcing Labor Standards*, *supra* note 20, at 381 (quoting Julie Su, the head of the California Division of Labor Standards Enforcement, on “government neutrality”: “[W]e are not a neutral agency. We are on the side of the law . . . . We need to always act fairly but if you break the law, you are going to view our enforcement as biased.”).

164. See Clopton, *supra* note 6, at 288–89 (citing maximalists); *supra* notes 85–87, 142–43 and accompanying text.

enforcement may be a feature, rather than a bug, of federal statutory design.<sup>165</sup> Redundancy helps ensure proper levels of enforcement, and courts already have procedural mechanisms for resolving problems of overlap.<sup>166</sup>

Co-enforcement need not—and likely would not—become the norm, however. Enforcers would not get rid of parallel enforcement entirely, they would just consider collaboration whenever and wherever possible and preferred. This may strike a balance between duplication that is actually useful and duplication that is merely redundant.

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As this Part has shown, the same political and economic theories that sparked the development of parallel hybrid enforcement schemes would likely also support a move to public-private co-enforcement. Co-enforcement may help resolve distrust of government, preserve legislative over solely executive preferences, ensure democratic participation, and use limited public enforcement resources effectively. Moreover, integrated co-enforcement can resolve some of the criticisms of parallel hybrid enforcement design by reducing contradiction and shirking in the enforcement process and duplication and agency costs in litigation. Still, if moving from parallel hybrid to integrated public-private co-enforcement may make sense as a matter of theory, that does not justify changing the status quo. For that, this Article turns to necessity, arguing that current capacity to secure enforcement of key public laws is on a path to a dangerous low point.

## II. NORMATIVE CASE FOR PUBLIC-PRIVATE CO-ENFORCEMENT

For over a decade, “litigation reform”<sup>167</sup> efforts and related Supreme Court jurisprudence have limited class action practice, intensified federal pleading standards, and compelled ever-more

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165. See FARHANG, LITIGATION STATE, *supra* note 6, at 3–4, 31–34; Clopton, *supra* note 6, at 290 (explaining that spreading authority “across diverse agents may respond to errors, resource constraints, information problems, or agency costs at the level of case selection”); *supra* notes 6, 55, 62 and accompanying text.

166. See Clopton, *supra* note 6, at 325–30 (describing helpful mechanisms, e.g., “pairing offset with non-preclusion” and using “claims-processing rules,” like stays, notice requirements, and timing rules, for intervention).

167. See Burbank & Farhang, *supra* note 6, at 1551–67; *infra* Part II.A.3.

mandatory arbitration—trends that now pose an existential challenge to the private enforcement of public law.<sup>168</sup> Meanwhile, budgetary constraints and a new level of deregulatory fervor are shrinking already limited public agency capacity for enforcement litigation, with reverberations likely felt long into the future.<sup>169</sup> This Part provides the context in which enforcement of public law now lies and argues that, as a normative matter, with both halves of the hybrid enforcement system equally hobbled, co-enforcement is a necessary response to ensure an appropriate level of public law enforcement. It begins by tracing procedural trends that now hamper private plaintiffs' ability to enforce public law in the courts, and political trends that now hamper public agencies' own enforcement capacities. It then considers how moving to integrated, rather than parallel and separate, enforcement could resolve these constraints. It concludes by considering potential normative counterarguments.

Notably, this Part rests on an underlying assumption that a decline in the amount of enforcement litigation pursued is undesirable. If fewer lawsuits are filed and pursued, why is that necessarily a bad outcome? Does it instead reflect increased compliance with the law, or increased alternative dispute resolution? It is true that some part of a decline in enforcement litigation may be due to these welcome factors; but another, more significant part of any such decline is now, or will soon be, due to constraints on enforcers' abilities to pursue litigation.<sup>170</sup> This Article presumes that maintaining a visible level of robust enforcement litigation signals that complying with the law and its regulations matters—and that failing to comply comes with serious economic risks that outweigh its benefits.<sup>171</sup>

#### A. PRIVATE ENFORCEMENT DEFICITS

For over a decade, legal scholars have been documenting how procedural jurisprudence has become increasingly hostile to

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168. See *infra* Part II.A.

169. See *infra* Part II.B.

170. See *infra* Part II.A.

171. This Part also assumes that, to protect the public interest, federal agencies should be actively carrying out their mandates to enforce laws and regulations against those who violate them. If one disagrees with that premise, there will be little appeal in co-enforcement's ultimate goal of more effective enforcement.

civil litigation plaintiffs, limiting access to federal courts.<sup>172</sup> This drift stands to have a profound impact on the ability of private litigants to help enforce public laws. Without rehashing the vast scholarship on the trend away from private civil litigation, this Section seeks to highlight three separate jurisprudential trends that have now created a perfect storm of limitations on private attorneys general: increasingly mandatory arbitration, intensified pleading standards, and restrictions on class action certification.<sup>173</sup>

### 1. Mandatory Arbitration

While arbitration has long been a part of business law practice, the past decade of Supreme Court jurisprudence on mandatory arbitration clauses has altered the field, expanding the use of arbitration to block litigation in key areas of public law like employment, consumer, and antitrust. In a series of decisions between 2009 and 2018, the Supreme Court upheld the enforceability of pre-dispute mandatory arbitration clauses, thus foreclosing litigation, against an increasingly compelling series of legal arguments.<sup>174</sup> To do so, the Court majority drew a distinction between a statutory right in a federal law and the legal forum—federal court or private arbitration—in which that statutory right may be enforced.<sup>175</sup> The majority held so over dissenters' repeated arguments that the distinction between rights and forum was meaningless for any federal statute primarily enforced through a private right of action.<sup>176</sup>

The new jurisprudence of arbitration began in 2009, in *14 Penn Plaza v. Pyett*,<sup>177</sup> in which the Court effectively overruled long-standing precedent to hold that a union's agreement to arbitrate could waive an individual employee's choice of judicial forum in the employee's own lawsuit to enforce an individual right guaranteed by a federal statute.<sup>178</sup> The Court found no legal distinction between individual arbitration agreements and

172. See *infra* notes 203–05, 225–27, 248 and accompanying text.

173. See also Bornstein, *supra* note 28, at 123–25, 142–53.

174. See *id.* at 124, 146–51.

175. See *id.* at 146–51.

176. See *id.*

177. *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009).

178. *Id.* at 260–68 (effectively overruling *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and holding that individual employees who experienced age discrimination could not file a lawsuit in federal court because the union they

those signed by a union,<sup>179</sup> ignoring Justice Souter's dissent that a private right of action was a "vital element" of federal antidiscrimination suits, essential to "vindicat[ing] the important congressional policy against discriminatory employment practices."<sup>180</sup> The next year, in *Rent-A-Center v. Jackson*,<sup>181</sup> the Court held that an employee alleging race discrimination was compelled to arbitrate even his challenge to whether the mandatory pre-dispute arbitration agreement he signed was enforceable.<sup>182</sup> Writing for the majority, Justice Scalia laid the foundation for the cases that followed, reasoning that any contract with an arbitration clause must be enforced under the Federal Arbitration Act of 1925 (FAA) unless invalid as a matter of contract law.<sup>183</sup> This became binding precedent, despite the fact that the FAA was intended to allow arbitration among equally-situated business entities, not to force citizens seeking to enforce their statutory rights to give up judicial fora.<sup>184</sup>

In later cases, the Court held that not only could plaintiffs be required to arbitrate federal statutory claims, but they could be required to do so *on an individual basis*—even if that meant their claims would not be pursued at all.<sup>185</sup> In a 2011 consumer

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belonged to had agreed to an arbitration clause in its collective bargaining agreement with the employer—despite the fact that the union declined to represent the employees in their claims).

179. *Id.* at 258.

180. *Id.* at 278 (Souter, J., dissenting); see also Bornstein, *supra* note 28, at 146–47.

181. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

182. *Id.* at 65–68, 73–75 (distinguishing a challenge to the fees arrangement for the delegation provision from a challenge to the delegation provision itself).

183. *Id.* at 67–68. Because "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract," Scalia wrote, it "places arbitration agreements on an equal footing with other contracts . . . and requires courts to enforce them according to their terms . . . [unless] invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'"—none of which were alleged in this case. *Id.* (citation omitted).

184. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642–43 (2018) (Ginsburg, J., dissenting).

185. The first case in this series was *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, in which the Court held that, where the parties disagreed over whether the arbitration agreement included class claims, the arbitrator exceeded his authority under the FAA by allowing the arbitration to proceed on a class-wide basis. 559 U.S. 662, 685–86 (2010). But see *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) (upholding an arbitrator's decision to allow arbitration on a class-wide basis where the parties agreed to submit the question, on which the arbitration agreement was silent, to the arbitrator).

case, *AT&T Mobility v. Concepcion*,<sup>186</sup> the Court upheld a mandatory arbitration clause in an adhesive contract for cell phone services that waived customers' rights to pursue claims on any class-wide basis, including in class arbitration.<sup>187</sup> Writing for the dissent, Justice Breyer argued that, because each consumer's damages amount to roughly \$30 in fees, requiring individual arbitration would "have the effect of depriving claimants of their claims" (while providing AT&T with a huge windfall in the aggregate).<sup>188</sup>

In a 2013 antitrust case *American Express v. Italian Colors Restaurant*,<sup>189</sup> the Court compelled individual arbitration, rejecting even its own prior precedent on an "effective vindication" exception to the FAA when an arbitration agreement "operat[ed] . . . as a prospective waiver of a party's right to pursue statutory remedies."<sup>190</sup> Again, the cost to prove the case (\$1 million or more in expert fees) dwarfed a plaintiff's individual damages (\$39,000 at most); yet the Court found that mandating individual arbitration "does not constitute the elimination of the right to pursue that remedy."<sup>191</sup> In a scathing dissent, Justice Kagan called the holding "a betrayal" that would lead to "poorer enforcement of federal statutes" and arbitration agreements so "pointless" that they are, in effect, "backdoor waivers of statutory rights."<sup>192</sup>

Then, in a 2018 employment case, *Epic Systems Corp. v. Lewis*,<sup>193</sup> the Court held that the FAA preempts even *another federal statute* that conflicts with an agreement to arbitrate.<sup>194</sup> Employees seeking to enforce their right to fair pay under the

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186. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

187. *Id.* at 336–48 (holding that the FAA preempted state law that would have rendered the contract unconscionable because "nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of [its] objectives" of enforcing contracts to arbitrate, thus preempting *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

188. *Id.* at 365.

189. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

190. *Id.* at 242 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)); *see also* Bornstein, *supra* note 28, at 148–49.

191. *Italian Colors*, 570 U.S. at 234–38.

192. *Id.* at 239–45 (Kagan, J., dissenting). *See also* Bornstein, *supra* note 28, at 149.

193. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

194. *Id.* at 1623–24.

federal Fair Labor Standards Act argued that arbitration agreements requiring them to waive any class-based remedies violated their right under the National Labor Relations Act “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection” at work.<sup>195</sup> The Court majority, once again, rejected the argument as preempted by the FAA because holding “an agreement ‘illegal’ as a matter of federal statutory law” still “impermissibly disfavors arbitration.”<sup>196</sup> The dissent, by Justice Ginsburg, described the majority decision as “egregiously wrong” and warned about its impact on the private enforcement of public law:

The inevitable result of today’s decision will be the underenforcement of federal . . . statutes designed to advance the well-being of vulnerable workers . . . The U.S. Department of Labor . . . and state attorneys general can uncover and obtain recoveries for some violations . . . . Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws . . . . If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen.<sup>197</sup>

With this suite of cases, the Court has now prioritized the FAA’s protection of arbitration clauses over all else—with deep implications for private enforcement of federal public laws.<sup>198</sup> Indeed, under long-standing FAA precedent, a plaintiff’s federal statutory rights may be included in an arbitration agreement and need not be heard *only* in federal court.<sup>199</sup> But allowing resolution of federal statutory claims through private arbitration was meant to provide plaintiffs with more choices of forum and greater enforcement opportunities.<sup>200</sup> The Court has now twisted

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195. *Id.* at 1624; see 29 U.S.C. § 157 (2012).

196. *Epic Systems*, 138 S. Ct. at 1623–24.

197. *Id.* at 1633, 1646–47 (Ginsburg, J., dissenting).

198. See also David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985, 985, 1009–30 (2017) (“Arbitration can dramatically alter the returns from enforcement of statutes with incentives for private civil litigation.”).

199. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (explaining that “statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA” (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))); Bornstein, *supra* note 28, at 150.

200. See *Gilmer*, 500 U.S. at 29 (noting that “arbitration agreements . . . ‘serve to advance the objective of allowing [plaintiffs] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise”



this option into something that can be mandatorily *compelled* on an individual basis, effectively foreclosing enforcement of countless claims. Data shows that, in the wake of the Court's recent precedent, employer and business use of arbitration clauses—including those waiving rights to any class claims—are on the rise.<sup>201</sup> Worse still, current jurisprudence has emboldened efforts to require arbitration in other areas of federal statutory law where arbitration clauses did not exist—for example in corporate charters or by-laws for public corporations, with the potential to cut off shareholder derivative actions to enforce securities laws.<sup>202</sup>

As legal scholars have noted, the Court's most recent decade of arbitration jurisprudence prioritizing the FAA over all else has created a coming crisis in limiting access to the courts.<sup>203</sup> As a result, the impact on the private enforcement arm of hybrid

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(quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989)); Bornstein, *supra* note 28, at 150.

201. See, e.g., *Epic Systems*, 138 S. Ct. at 1644 (Ginsburg, J., dissenting) ("Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. . . . [I]n response to subsequent decisions addressing class arbitration, employers have increasingly included in their arbitration agreements express group-action waivers." (citations omitted)); KATE HAMAJI ET AL., ECON. POL'Y INST., UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 3 (May 2019), <https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf> [<https://perma.cc/A27E-6YUP>] ("By 2024, more than 80 percent of private-sector, nonunion workers will be blocked from court by forced arbitration clauses with class- and collective-action waivers.").

202. See Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1189 (2013); Alison Frankel, *The Case Against Mandatory Shareholder Arbitration*, REUTERS (Aug. 22, 2018), <https://www.reuters.com/article/us-otc-arbitration/the-case-against-mandatory-shareholder-arbitration-idUSKCN1L7282> [<https://perma.cc/8BWB-6TWN>].

203. See, e.g., Gilles & Friedman, *After Class*, *supra* note 6, at 627–30 (describing "the game-changing edict that companies . . . may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts," and that "most . . . of the companies that touch consumers' day-to-day lives can and will now place themselves beyond the reach of aggregate litigation"); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704, 720–27 (2012); see also Bornstein, *supra* note 28, at 149–50 (citing scholarship).

enforcement systems stands to be extreme. If forced to arbitrate, many private citizens will forgo enforcement actions altogether. And, if forced to arbitrate individually, many class actions essential to enforcing public laws will never be brought.<sup>204</sup> Even if a private enforcer is willing to arbitrate to enforce a federal statute, the deterrent effect of arbitration is entirely undermined by the lack of publication or confidentiality requirements of most arbitration resolutions, which remove any signaling effect to other potential defendant-violators.<sup>205</sup> To the extent that hybrid enforcement systems rely on private litigation, compelled arbitration jurisprudence poses a grave threat to the enforcement of public law.

## 2. Intensified Pleading Standards

For those private plaintiffs seeking to enforce public law who are allowed to litigate rather than compelled to arbitrate, another recent procedural development poses a second obstacle: intensified federal court pleading standards.<sup>206</sup> Around the same time as the Supreme Court began its move toward increasingly compelled arbitration, it also made a significant procedural move toward requiring more from plaintiffs' initial pleadings to begin a lawsuit.

Since 1938, when the Federal Rules of Civil Procedure were enacted, Rule 8(a) had established a broad standard for complaints filed in federal court, referred to as "notice pleading."<sup>207</sup> As the Court described it in the 1957 case *Conley v. Gibson*, a plaintiff need only provide "a short and plain statement of the claim"<sup>208</sup> showing that "the [plaintiff] is entitled to relief."<sup>209</sup> This

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204. See *supra* Part II.A (discussing additional constraints on class action doctrine).

205. See, e.g., Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 935–50, 959–60 (2006) (analyzing the shift toward confidential settlements of civil rights claims and its consequences).

206. See Bornstein, *supra* note 28, at 123–25, 142–46 (discussing pleading standards cases).

207. See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288–89, 333 (2013).

208. *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting FED. R. CIV. P. 8(a)(2)).

209. FED. R. CIV. P. 8(a)(2). Plaintiffs must also state "grounds for the court's jurisdiction," FED. R. CIV. P. 8(a)(1), and "a demand for the relief sought," FED. R. CIV. P. 8(a)(3).

broad standard served the goal of the Federal Rules “to do substantial justice,”<sup>210</sup> the Court explained, and established that a complaint should be dismissed only when “it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”<sup>211</sup>

In two cases decided in 2007 and 2009, the U.S. Supreme Court upped the ante for what a plaintiff must include in a court pleading to survive a motion to dismiss, moving from a standard of “notice pleading” to a requirement of “plausible pleading.”<sup>212</sup> In 2007, in antitrust case *Bell Atlantic Corp. v. Twombly*,<sup>213</sup> the Court majority reinterpreted *Conley* and all of its subsequent precedent, reasoning that the “no set of facts” language in *Conley* had been misapplied: it was not meant to create a “minimum standard of adequate pleading” but, instead to “describe[] the breadth” of possible proof for an “adequate complaint.”<sup>214</sup> The Court established a new standard for Rule 8(a): a complaint pleaded with enough facts to “plausibly suggest[]” rather than be “merely consistent with” the plaintiff’s alleged claims.<sup>215</sup> Applying this standard, the Court dismissed plaintiffs’ claims that telephone and internet service providers had conspired to set prices under the federal Sherman Act because their complaint failed to “nudge[] their claims across the line from conceivable to plausible.”<sup>216</sup> As it did in the context of compelled arbitration,<sup>217</sup> the Court’s dissent argued that this changed standard would limit private enforcement of public law. Writing for the dissent, Justice Stevens explained that Congress’s choice to allow for treble damages and attorneys’ fees in the Sherman Act showed “inten[t] to encourage . . . private enforcement of the

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210. *Conley*, 355 U.S. at 48 (citing FED. R. CIV. P. 8(f) (2006) (amended 2007)). Rule 8(f) is now Rule 8(e) and reads: “Pleadings must be construed so as to do justice.” FED. R. CIV. P. 8(e).

211. *Conley*, 355 U.S. at 45–46 (emphasis added).

212. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

213. 550 U.S. at 562 (quoting *Conley*, 355 U.S. at 45).

214. *Id.* at 562–63.

215. *Id.* at 557–58.

216. *Id.* at 570.

217. See *supra* notes 188, 192, 197 and accompanying text.

law,”<sup>218</sup> which made it especially important to “not add requirements to burden the private litigant beyond what is specifically set forth by Congress.”<sup>219</sup>

Two years later, in *Ashcroft v. Iqbal*,<sup>220</sup> the Court clarified that its holding in *Twombly* applied beyond antitrust matters to all federal pleadings when it dismissed the civil rights claims of a Pakistani detainee alleging abuse in federal custody for failing to meet the new “plausibility” standard.<sup>221</sup> The Court elaborated on its *Twombly* test, describing it as a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense”<sup>222</sup>—a standard that has only contributed to further subjectivity and confusion for plaintiffs seeking to file federal lawsuits to enforce public law. Justice Souter, who had sided with the majority in *Twombly*, authored the *Iqbal* dissent, in which he criticized the majority for reading the pleadings so narrowly as to “den[y] [plaintiff] Iqbal a fair chance to be heard . . . .”<sup>223</sup>

As with the trend toward compelled arbitration,<sup>224</sup> the shift to plausible pleading has sparked analysis that goes well beyond the scope of this Article—both legal scholarship on its impact on plaintiffs’ complaints<sup>225</sup> and empirical studies on its effect on case dismissal rates.<sup>226</sup> Yet while the overall picture may be inconclusive, one data point is clear: private lawsuits in which

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218. *Twombly*, 550 U.S. at 587 (Stevens, J., dissenting).

219. *Id.* (quoting *Radovich v. Nat’l Football League*, 352 U.S. 445, 454 (1957)).

220. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

221. *Id.* at 678, 684 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’ . . . .” (quoting FED. R. CIV. P. 1)).

222. *Id.* at 679.

223. *Id.* at 692 (Souter, J., dissenting).

224. *See supra* Part II.A.1 (examining this trend).

225. *See, e.g.*, SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS? 79–126 (2013) (studying this impact); Miller, *supra* note 207, at 331–39, 346–47 (describing the two cases as “a procedural ‘sea change’ in plaintiffs’ ability to survive the pleading stage”); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1713 (2013) (studying this trend); *see also* Bornstein, *supra* note 28, at 144–45 (citing scholarship); Burbank & Farhang, *supra* note 6, at 1567–68, 1604–06 (describing same).

226. *See, e.g.*, DODSON, *supra* note 225, at 83–106; Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 604–07 (2012); Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*,

there is information asymmetry between plaintiffs and defendants—such as an employee’s discrimination lawsuit against an employer or a consumer’s antitrust lawsuit against a corporation—are the most likely to be impeded by the intensified pleading standard.<sup>227</sup> Thus, for public law statutes in which a private right of action is essential to enforcement, like Title VII or the Sherman Act, requiring more information at the outset of a case prior to discovery poses an additional challenge for those acting as private attorneys general.<sup>228</sup>

### 3. Narrowed Class Action Doctrine

Lastly, should private plaintiffs escape compelled arbitration and plead plausibly enough to survive a motion to dismiss, a third procedural trend may still preclude private enforcement: limitations on class action certification.<sup>229</sup> While efforts to reign in class actions are not new, like arbitration and pleading standards, recent Supreme Court jurisprudence in this area has created additional hurdles.<sup>230</sup>

As Stephen Burbank and Sean Farhang document, it was not long after the increase in federal statutes establishing private enforcement in the 1960s that the executive branch shift to

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6 FED. CTS. L. REV. 1 (2011) (examining dismissal rates); Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y. L. SCH. L. REV. 719, 727–43 (2013); see also Bornstein, *supra* note 28, at 144–45 (citing scholarship).

227. See, e.g., DODSON, *supra* note 225, at 108–12; Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 597, 609, 630 tbl.D (2010); Malveaux, *supra* note 226, at 721 n.10; Moore, *supra* note 226, at 618–19; Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 4, 35–38 (2011); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1618–21 (2011) (examining this impact); see Bornstein, *supra* note 28, at 144–45 (citing scholarship). But see David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (discussing impact of empirical methodology on assessments of *Twombly* and *Iqbal* impact).

228. See Bornstein, *supra* note 28, at 144–45.

229. See *id.* at 123–25, 151–54.

230. See Burbank & Farhang, *supra* note 6, at 1603–06. For a detailed history on the rise of the class action device and clashes over its interpretation and limitation from the 1950s to the 1990s, see generally David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 (2013) and David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785 (2018).

Republican control under President Reagan sparked a desire for deregulation and, with it, a project of “litigation reform.”<sup>231</sup> The Reagan administration recognized that, as private enforcement of federal law grew, it posed “an obstacle to their regulatory reform agenda.”<sup>232</sup> In particular, Burbank and Farhang explain, the administration set their sights on statutory fee-shifting provisions that they believed “forced business and government to pay the attorneys[ ] . . . of plaintiffs who launched invasive, disruptive, and costly lawsuits . . . .”<sup>233</sup> Throughout the 1980s, the administration sought to pass legislation that would cap or do away with attorneys’ fees or punitive damages for enforcement of federal statutes but, with a few exceptions, were unsuccessful.<sup>234</sup>

The Reagan administration did, however, succeed in positioning deregulation supporters on the Federal Rules Committee and in the courts.<sup>235</sup> As a result, the “litigation-friendly” Federal Rules that had been established in 1938 and amended to support private enforcement through fee shifting in class actions in 1966 were further amended in 1998 and 2003 to the opposite end.<sup>236</sup> As amended, Rule 23 adopted more stringent notice and opt-out procedures and modified attorneys’ fees awards, reflecting the Committee’s belief that “large attorney fees in the absence of meaningful recoveries by class members . . . brings the civil justice system into disrepute.”<sup>237</sup>

Meanwhile, federal courts began to move in the same direction, with decisions on requirements and burdens for evidence

231. See Burbank, *supra* note 6, at 1544–46.

232. See *id.* at 1551–52.

233. See *id.* (“Reagan himself was openly hostile to liberal public interest lawyers, characterizing them in the early to mid-1970s as ‘a bunch of ideological ambulance chasers doing their own thing at the expense of the . . . poor who actually need help’ and as ‘working for left-wing special interest groups at the expense of the public.’” (quoting Ronald J. Ostrow, *Legal Services Agency Battles Reagan Attempt to Cut Off Its Funding*, L.A. TIMES, Apr. 12, 1981, at B1)).

234. See *id.* at 1552–55, 1562–65 (noting narrow coverage of federal statutes in the Private Securities Litigation Reform Act of 1995, the Prison Litigation Reform Act of 1996, and the Class Action Fairness Act of 2005 (CAFA)).

235. See *id.* at 1567–68, 1583–605 (discussing the Advisory Committee).

236. See *id.* at 1583–605.

237. Amendments to the Federal Rules of Civil Procedure, 215 F.R.D. 158, 183–99, 194 (2003).

that made it harder for plaintiffs' to certify a class.<sup>238</sup> This trend culminated in 2011, in the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,<sup>239</sup> in which, as Burbank and Farhang note, it came as "no surprise" that interpretation of requirements for class certification "ha[d] been stretched to the breaking point."<sup>240</sup> In *Wal-Mart*, a case in which private plaintiffs alleged employment discrimination in violation of federal law, the court adopted a new, more stringent interpretation of Rule 23 and reversed the appellate court decision granting class certification.<sup>241</sup> To meet the "commonality" requirement for class certification under Rule 23, the Court held it was no longer enough to ask whether "there are questions of law or fact common to the class;"<sup>242</sup> plaintiffs must show that class treatment would "generate common *answers* apt to drive the resolution of the litigation."<sup>243</sup> Then, to decide if plaintiffs met this new standard, the Court looked beyond certification issues to the underlying merits of the case and held they had not. According to the Court majority, the plaintiffs' evidence lacked "some glue holding the alleged *reasons* for all those [discriminatory] decisions together" and failed to prove commonality under Rule 23(a)(2).<sup>244</sup> Justice Ginsburg, writing for the dissent, criticized the Court majority for merging Rules 23(a) and 23(b)(3) and going too far into the merits at the class certification stage, "disqualify[ing] the class at the starting gate" of its enforcement action.<sup>245</sup>

The Court also held, for the first time, that cases seeking more than "incidental" monetary damages accompanying injunctive relief must follow "opt-in" procedures for determining class members under Rule 23(b)(3), rather than "opt-out" procedures

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238. See Burbank & Farhang, *supra* note 6, at 1603–04 (examining this trend).

239. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

240. See Burbank & Farhang, *supra* note 6, at 1603–04.

241. *Wal-Mart*, 564 U.S. at 342–43, 346, 367.

242. *Id.* at 349–51 (citing FED. R. CIV. P. 23(a)(2)).

243. *Id.* at 349 (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)); see Bornstein, *supra* note 28, at 150–52.

244. *Wal-Mart*, 564 U.S. at 344, 349–52, 354–57; see Bornstein, *supra* note 28, at 150–52.

245. *Wal-Mart*, 564 U.S. at 368, 377 (Ginsburg, J., concurring in part and dissenting in part); see Bornstein, *supra* note 28, at 150–52.

under Rule 23(b)(2),<sup>246</sup> likely increasing the cost to plaintiffs' attorneys to pursue class claims and limiting the size of the class for those that do.<sup>247</sup>

As with arbitration and pleading trends, the literature on class action reform is large and robust, a review of which is beyond the scope of this Article.<sup>248</sup> But, given that class actions are an essential tool for private enforcers—especially when an individual plaintiff's recovery is too small to warrant the cost and effort of litigation—the trend toward increasing the costs and procedural hurdles for class certification under Rule 23 also threatens statutory enforcement.<sup>249</sup>

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As the many dissenting Justices in the Court's recent jurisprudence on mandatory arbitration, pleading standards, and class actions identify, the available forum and the procedural rules applied in it may determine whether a federal statutory right can ever be enforced by a private attorney general. The combined result of these three legal developments has yet to be fully felt. Yet, there is no doubt that, together, the trends will sharply curb the reach of private enforcement of public law in a

246. *Wal-Mart*, 564 U.S. at 359–65, 367–77 (the Court was unanimous on this point); see also Bornstein, *supra* note 28, at 150–52.

247. See Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34, 51–52 (2011).

248. See, e.g., Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1098, 1105–14 (2013) (detailing “a long line of restrictive federal court decisions that extends back almost fifteen years and . . . greatly limited access to the class action device”); Burbank & Farhang, *supra* note 6, at 1606–08; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). An entire body of work focuses on the *Wal-Mart* decision's negative impact on private enforcement of civil rights. See Bornstein, *supra* note 28, at 123–25, 151–54; Malveaux, *supra* note 247, at 51–52; Seiner, *supra* note 118, at 1350–51; Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 500–01 (2011). But see Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 435 (2012) (suggesting a more limited impact).

249. Procedural limits on class certification are further compounded by the separate trend of upholding mandatory arbitration agreements that include waivers of any class claims, as described previously. See *supra* notes 193–201 and accompanying text.



hybrid system—in effect, undermining Congress’s direction for how its statutes should be enforced.<sup>250</sup>

#### B. PUBLIC ENFORCEMENT DEFICITS

Turning to the other half of hybrid enforcement mechanisms, public enforcement efforts also now face unprecedented challenges and limitations. Of course, federal agencies have always operated with limited resources determined by federal government budgets. Even scholars critical of rent-seeking private class action attorneys acknowledge that a major advantage of allowing private enforcement is its ability to multiply overall enforcement resources.<sup>251</sup> Likewise, scholars who argue in favor of predominantly public enforcement regimes or who propose stronger public oversight of private attorneys general recognize that, to do so, requires leveraging the finances of the private bar.<sup>252</sup> Without repeating these concerns, this Section adds contemporary context, highlighting that a new level of economic and political pressure toward deregulation, exacerbated by recent Supreme Court jurisprudence, now stands to limit public agency enforcement into the future.<sup>253</sup>

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250. See Burbank & Farhang, *supra* note 6, at 1605–06 (“[T]he Supreme Court—whose members are . . . insulated from individual if not institutional reprisal—can bring about momentous civil litigation reform that would be impossible to secure from the legislature or its delegated procedural lawmaking bodies . . . . [Wal-Mart, Twombly, and Iqbal] involved ‘interpretations’ that are inimical to private enforcement . . . .”); *supra* notes 167–71 and accompanying text.

251. See, e.g., COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 18–30; Coffee, *Rescuing the Private AG*, *supra* note 6, at 218–25 (discussing this advantage).

252. See, e.g., Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1384 (explaining finances); Gilles & Friedman, *After Class*, *supra* note 6, at 623.

253. See, e.g., Jesse Eisinger & Paul Kiel, *After Budget Cuts, the IRS’ Work Against Tax Cheats Is Facing “Collapse,”* PROPUBLICA (Oct. 1, 2018, 5:00 AM), <https://www.propublica.org/article/after-budget-cuts-the-irs-work-against-tax-cheats-is-facing-collapse> [<https://perma.cc/L8ES-VGBP>]. But see Jonathan Remy Nash et al., *The Production Function of the Regulatory State: How Much Do Agency Budgets Matter?*, 102 MINN. L. REV. 695, 734–41 (2017) (describing the complex, non-linear relationship between agencies’ budgets and their effectiveness).

### 1. Executive Preferences and Budget Constraints

Discretionary budgets and federal agency spending have risen and fallen over time, usually in line with changes in executive branch preferences between Republican and Democratic administrations. Since the rise of federal statutes with hybrid regimes in the 1960s,<sup>254</sup> most Republican presidential administrations have expressed preferences for smaller government and, with it, smaller discretionary agency budgets than have most Democratic administrations.<sup>255</sup> In over five decades since the creation of many federal agencies, this has led to ebbs and flows in support for agencies' enforcement efforts, within a reasonable range of variation.<sup>256</sup>

In the most recent decade, however, economic and political trends have triggered a notable change in the usual federal budgeting process,<sup>257</sup> representing a serious threat to reliable levels of public agency enforcement. First, the Great Recession

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254. See FARHANG, LITIGATION STATE, *supra* note 6, at 3–4, 31–34; Burbank et al., *supra* note 1, at 644.

255. Note, however, that a preference for apportioning less of the federal budget to federal agencies has not necessarily translated into less government spending overall, due to some Republican presidents' choices to increase defense spending, institute tax cuts, or take other government-funded fiscal measures to stimulate the economy. See, e.g., Kimberly Amadeo, *Republican Presidents' Impact on the Economy*, THE BALANCE, (June 25, 2019), <https://www.thebalance.com/republican-presidents-economic-impact-4129133> [<https://perma.cc/NZY4-HKHK>]; Gabriel Florit, et al., *40 Years of Budgets Show Shifting National Priorities*, WASH. POST (March 17, 2017), [https://www.washingtonpost.com/graphics/politics/budget-history/?utm\\_term=.54b46b1269be](https://www.washingtonpost.com/graphics/politics/budget-history/?utm_term=.54b46b1269be) [<https://perma.cc/5VZC-ELRN>].

256. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, TABLE 4.1—OUTLAYS BY AGENCY: 1962–2024, <https://www.whitehouse.gov/wp-content/uploads/2019/03/hist04z1-fy2020.xlsx> [<https://perma.cc/V6SV-43SX>]; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, TABLE 4.2—PERCENTAGE DISTRIBUTION OF OUTLAYS BY AGENCY: 1962–2024, <https://www.whitehouse.gov/wp-content/uploads/2019/03/hist04z2-fy2020.xlsx> [<https://perma.cc/SF3G-3SKP>] (showing proportion of discretionary budget assigned to federal agencies relative to defense and other major categories of spending over time). For analysis of “the budget as a method through which the White House can control agencies' policymaking,” see generally Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2187 (2016).

257. Since the Congressional Budget and Impoundment Control Act of 1974, the usual federal budgeting process is that Congress must draft and authorize the federal government's budget annually in conjunction with the President. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601–688 (2012)).

of 2008 required significant investment by the Obama administration to spur economic recovery, affecting immediate federal budgeting priorities.<sup>258</sup> Second, partly in response to government intervention in the economic crisis, in 2009 a new political movement known as the Tea Party took root, arguing for drastically reduced federal government which it viewed as impeding free market principles.<sup>259</sup> Political success by the Tea Party in the mid-term elections of 2010 led to a new era of contentious budget fights. During this period, a Republican-led Congress enacted the Budget Control Act of 2011,<sup>260</sup> which placed limits on discretionary spending and set triggers for budget “sequestration” through at least the year 2021.<sup>261</sup>

Then, in 2013, disputes over the federal budget and funding for the Affordable Care Act led the entire federal government to be shut down for sixteen days, for the first time in nearly two decades.<sup>262</sup>

The political support for smaller government was further reflected in the election of populist Republican President Donald

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258. Brian Knowlton, *Obama Presses for Action on the Economy*, N.Y. TIMES (Jan. 8, 2009), <https://nytimes.com/2009/01/09/us/politics/09obamacnd.html?SeachResultPosition=1> [<https://perma.cc/N727-TB2H>].

259. Michael Ray, *Tea Party Movement*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Tea-Party-movement> [<https://perma.cc/5DDP-UW9A>].

260. Pub. L. No. 112-25, 125 Stat. 240 (codified as amended at 2 U.S.C. § 901 (2012)).

261. Later amended to increase sequestration caps and extend mandatory spending cuts through 2023 by the American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013) and the Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165.

262. There have long been disputes over the federal budget between presidents and Congress when they represent different political parties, but recent trends reflect greater gridlock. It was not until 1980 that budget disputes resulted in shutting down the federal government and, between 1980 and 1995, budget disputes resulted in federal government closures for a cumulative total of seventeen days. See Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> [<https://perma.cc/UB7C-BDMB>] (last updated Jan. 25, 2019). Since 1995, however, government shut downs have become a more frequently used political tool, resulting in five different shut downs lasting a cumulative period of seventy-nine days. See *id.*

Trump in 2016.<sup>263</sup> As of the time of publication of this Article, the current Trump administration has been among the most rigorous and aggressive in enacting its deregulatory agenda. In his first year in office, President Trump planned to slash some federal agency budgets by up to thirty percent,<sup>264</sup> and proposed a forty-two percent cut in non-defense discretionary funding in 2019 (including a thirty-four percent cut to the EPA and a twenty-one percent cut to the Department of Labor).<sup>265</sup> Trump also selected cabinet members to lead federal agencies that reflected his deregulatory preferences, several of whom were actively hostile to their agencies' own missions.<sup>266</sup> Under the current Trump administration, the clear priority is to undo past regulations and strip away public regulatory enforcement in all areas of law.<sup>267</sup>

If the damage to federal agency enforcement efforts were simply a matter of executive branch preferences, however, those

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263. See, e.g., Will Weissert, *Smaller Government? Some Trump Supporters Cheer the Shutdown*, ASSOCIATED PRESS (Jan. 26, 2019), <https://www.apnews.com/35303676b04144ffbd3e463d3addb2ba> [<https://perma.cc/C4W7-Q2HF>].

264. Lisa Rein & Andrew Ba Tran, *How the Trump Era Is Changing the Federal Bureaucracy*, WASH. POST (Dec. 30, 2017), [https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725\\_story.html](https://www.washingtonpost.com/politics/how-the-trump-era-is-changing-the-federal-bureaucracy/2017/12/30/8d5149c6-daa7-11e7-b859-fb0995360725_story.html) [<https://perma.cc/S6GU-22RF>]; see also Julia Manchester, *Most Key Federal Agencies Have Cut Staff Under Trump: Report*, THE HILL (Dec. 31, 2017), <https://thehill.com/homenews/administration/366925-most-key-federal-agencies-have-cut-staff-under-trump-report> [<https://perma.cc/4UQ3-3YJ7>].

265. Dylan Matthews, *Trump's 2019 Budget: What He Cuts, How Much He Cuts, and Why It Matters*, VOX (Feb. 12, 2018), <https://www.vox.com/policy-and-politics/2018/2/12/16996832/trump-budget-2019-release-explained> [<https://perma.cc/8M8Q-2ZUA>].

266. See, e.g., Coral Davenport, *Pruitt's Successor Wants Rollbacks, Too. And He Wants Them to Stick*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/climate/andrew-wheeler-epa.html> [<https://perma.cc/BZ83-K6DQ>]; Hallie Jackson & Kristen Welker, *Trump Picks Energy Department Opponent Rick Perry for Energy Secretary: Sources*, NBC NEWS (Dec. 12, 2016), <https://www.nbcnews.com/news/us-news/trump-picks-energy-department-opponent-rick-perry-energy-secretary-sources-n695241> [<https://perma.cc/DLZ9-NHW2>]; *Pruitt Publicly Admits He Wanted to Get Rid of the EPA*, NAT. RES. DEF. COUNCIL (July 17, 2017), <https://www.nrdc.org/trump-watch/pruitt-admits-he-wants-get-rid-epa> [<https://perma.cc/52E9-JYW2>].

267. See Nolan D. McCaskill & Matthew Nussbaum, *Trump Signs Executive Order Requiring that for Every One New Regulation, Two Must Be Revoked*, POLITICO (Jan. 30, 2017), <https://www.politico.com/story/2017/01/trump-signs-executive-order-requiring-that-for-every-one-new-regulation-two-must-be-revoked-234365> [<https://perma.cc/Z2Z4-YK52>].

could change with a new presidential administration. Yet with widespread political and legislative support for smaller government, President Trump was also able to pass significant tax cut legislation that stands to raise the deficit and dramatically reduce discretionary spending budgets for future administrations, too.<sup>268</sup>

## 2. A New Era in Campaign Finance

Beyond general economic and political pressures toward limiting federal government budgets, a more seismic shift toward deregulation threatens any future rebound in public enforcement levels: recent U.S. Supreme Court jurisprudence reshaping campaign financing. In two major decisions in the past decade, the Court put its thumb on the scale of political contributions in ways likely to exert intense political pressure away from public regulatory enforcement in perpetuity.<sup>269</sup>

First, in the 2010 case *Citizens United v. Federal Election Commission*,<sup>270</sup> the Court struck down certain restrictions on campaign expenditures, holding that they violated free speech provisions guaranteed by the U.S. Constitution.<sup>271</sup> The decision allows corporations, labor unions, and others to make unlimited political contributions so long as they are not directly linked to a specific party or candidate.<sup>272</sup> As a result, one political reporter described, a “deluge of cash poured into . . . political action committees” (or PACs), much of it “‘dark money’ [that] never has to be publicly disclosed.”<sup>273</sup>

While *Citizens United* removed limits on spending on both those who favor a robust regulatory environment (for example,

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268. See Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2054; Jim Tankersley, *How the Trump Tax Cut Is Helping to Push the Federal Deficit to \$1 Trillion*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/business/trump-corporate-tax-cut-deficit.html> [<https://perma.cc/H7UW-NC8W>].

269. Or until legislation changes this balance—a proposition made all the more unlikely by the reality that those who would legislate must fundraise to win election to their legislative seats.

270. 558 U.S. 310 (2010).

271. *Id.* at 335–66.

272. See *id.*; Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015), <https://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics> [<https://perma.cc/RZ77-AWSM>].

273. Levy, *supra* note 272.

labor unions) and those who oppose it (for example, corporations), in reality, the playing field is not level. With union membership at an all-time low of, in 2018, just 10.5% of all U.S. workers and only 6.4% of private sector workers,<sup>274</sup> union dues are no match for the combined contributions of business interests and high-wealth individuals to PACs.<sup>275</sup> Over half of the states have so-called “right-to-work” laws that allow workers protected by a union to opt out of all union dues, including both any portion of dues that go to political spending and any non-political “agency fees” meant to cover the cost of collective bargaining with the employer.<sup>276</sup>

More importantly, in a second recent decision, the 2018 case *Janus v. AFSCME*,<sup>277</sup> the Supreme Court upheld a “right-to-work”-style exemption for all public sector employees,<sup>278</sup> who compose nearly half of all union members in the United States.<sup>279</sup> The Court held that all public sector employees—who already had the ability to opt-out of their unions’ political contributions<sup>280</sup>—could opt out of their union agency fees, too, reasoning that to rule otherwise would “compel[ employees] to subsidize private speech on matters of substantial public concern” in

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274. Tal Axelrod, *Union Membership Falls to Historic Low*, THE HILL (Jan. 18, 2019), <https://thehill.com/homenews/news/426026-union-membership-falls-to-historic-low/> [<https://perma.cc/SST8-FW5L>]; Press Release, Bureau of Labor Statistics, *Union Members Summary*, (Jan. 18, 2019), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/3LYT-F6T2>].

275. See, e.g., Curtlyn Kramer, *Vital Stats: The Widening Gap Between Corporate and Labor PAC Spending*, BROOKINGS (Mar. 31, 2017), <https://www.brookings.edu/blog/fixgov/2017/03/31/vital-stats-corporate-and-labor-pac-spending/> [<https://perma.cc/QR33-JU3F>].

276. *Right to Work Frequently-Asked Questions*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <https://www.nrtw.org/right-to-work-frequently-asked-questions/> [<https://perma.cc/R3JH-H92G>].

277. 138 S. Ct. 2448 (2018).

278. *Id.* at 2486.

279. Bureau of Labor Statistics, *supra* note 274 (stating that 7.2 million of 14.7 million unionized workers work in the public sector).

280. See *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) (explaining that the Court’s prior precedent in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), already held that “a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment[, b]ut [that] no part of that fair-share payment could go to any of the union’s political or ideological activities”).

violation of the First Amendment.<sup>281</sup> Whether public sector employees will now opt out of union dues en masse remains to be seen; but data from right-to-work states indicates that a significant decline is possible.<sup>282</sup>

This jurisprudence stands to dramatically shift the future of political contributions away from legislators and executive branch officials who would favor active public enforcement litigation against public law violators<sup>283</sup>—a new political reality that changes the public agency side of the hybrid enforcement equation. Believing that the federal government will maintain or increase its current level of regulatory enforcement—or could increase capacity to allow for greater public oversight over private class action attorney enforcers—may now be unrealistic.

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281. See *id.* at 2460–86 (majority opinion); Dylan Matthews, *6 Excerpts that Explain the Supreme Court's Big Anti-Union Ruling: Janus v. AFSCME Is a Very, Very Big Deal*, VOX (June 27, 2018), <https://www.vox.com/2018/6/27/17509460/supreme-court-janus-afscme-public-sector-union-alito-kagan-dissent> [<https://perma.cc/J2Y8-WVXZ>].

282. Frank Manzo, IV & Robert Bruno, *After Janus: The Impending Effects on Public Sector Workers from a Decision Against Fair Share*, ILL. ECON. POLICY INST. (May 8, 2019), <https://illinoisepi.files.wordpress.com/2018/05/ilepi-pmcr-after-janus-final.pdf> [<https://perma.cc/E7CT-J78A>].

283. This trend stands to affect even Democrats who wish to win legislative seats at the federal level, at least as it relates to regulation in industry sectors more likely to fund Democrats, like financial services and the technology industry. See, e.g., Alan Zibel, *Plutocrat Politics: How Financial Sector Wealth Fuels Political Ad Spending*, PUB. CITIZEN (May 15, 2019), <https://www.citizen.org/article/plutocrat-politics-how-financial-sector-wealth-fuels-political-ad-spending/> [<https://perma.cc/TCL3-4LF8>]. Certainly, the success of progressive, grassroots-funded candidates like U.S. Representative Alexandria Ocasio-Cortez and U.S. Senator Bernie Sanders call this prediction into question. See, e.g., Christopher Ingraham, *Alexandria Ocasio-Cortez Received 62 Percent of Her Funding from Small-Dollar Donors. The Average House Member Received Less than 8 Percent*, WASH. POST (Dec. 21, 2018), <https://www.washingtonpost.com/business/2018/12/21/alexandria-ocasio-cortez-received-percent-her-funding-small-dollar-donors-average-house-member-received-less-than-percent/> [<https://perma.cc/SL8D-3HG7>]; Holly Otterbein & Maggie Severns, *Bernie's New Approach to Raising Cash: 'Grassroots Fundraisers'*, POLITICO (May 22, 2019, 5:01 AM), <https://www.politico.com/story/2019/05/22/bernie-sanders-money-1337897> [<https://perma.cc/X6TG-EULX>]. But a federal budget that sets funding levels for federal agencies must be passed by an entire Congress of legislators, all of whom need campaign contributions to maintain their seats.

## C. COLLABORATIVE SOLUTIONS TO ENFORCEMENT DEFICITS

Both public and private halves of current hybrid enforcement schemes now face critical levels of constraint. On the one hand, federal agencies created by Congress to enforce public law statutes are hamstrung by slashed budgets and intense deregulatory political preferences, limiting their capacity to litigate enforcement actions.<sup>284</sup> On the other, private attorneys general are limited by jurisprudence on compelled arbitration, pleading standards, and class action certification, reducing their incentives to take on risky litigation that serves a public good and, if a mandatory individual arbitration clause applies, barring them from doing so entirely.<sup>285</sup> Given this new normative reality, this Section argues that a proposal of co-equal co-enforcement has much to offer, providing needed resources to public enforcers while helping private enforcers overcome procedural hurdles.

On the public enforcement side, collaboration offers the obvious advantage of providing desperately needed litigation financing to public agencies with limited budgets.<sup>286</sup> Private attorneys general fund their cases through attorneys' fees, contingency fees, and private litigation financing mechanisms, all guided by their estimate of the value of the case rather than a narrow federal budget.<sup>287</sup> Combining forces also provides public agencies with additional person-power, and at a high level of expertise when those private attorneys are experienced in litigating complex class actions.<sup>288</sup> These observations are not new: legal scholars have long identified similar advantages of the private bar—even those scholars ambivalent about or seeking to reign in entrepreneurial private attorneys general.<sup>289</sup> Yet co-enforcement arrangements offer an important advantage over others' proposals to expand public oversight of private attorneys

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284. See *supra* Part II.B.

285. See *supra* Part II.A.

286. See *supra* Part II.B.

287. See, e.g., *Financial Management in a Contingent Fee Practice*, FINDLAW, <https://practice.findlaw.com/financing-a-law-firm/financial-management-in-a-contingent-fee-practice.html> [<https://perma.cc/WJ46-P55Q>].

288. See, e.g., Coffee, *Rescuing the Private AG*, *supra* note 6, at 225; Rubenstein, *supra* note 6, at 2149–50.

289. See, e.g., Clopton, *supra* note 6, at 314–15 (describing how “public and private enforcers draw on different resource pools” and “existing redundant-authority regimes are often justified on this basis”); Coffee, *Rescuing the Private AG*, *supra* note 6, at 225; Rubenstein, *supra* note 6, at 2149–50.



general.<sup>290</sup> A collaborative co-counsel approach recognizes that private attorneys, many of whom have deep expertise and lucrative class action practices, may bristle at the idea of serving as contract attorney “agents” for public agencies that they may perceive as overly bureaucratic—and for whom they are footing the bill. Indeed, despite three decades of academic calls for federal public oversight over private class action attorneys<sup>291</sup>—and even in the wake of new procedural restrictions on private attorneys<sup>292</sup>—there is little evidence that deputization schemes have been widely adopted at the federal level.<sup>293</sup> As described in Part III, each enforcer in a co-enforcement scheme would be co-equal in authority and would share in the financing of its own efforts,<sup>294</sup> likely a more attractive option for the private bar.

On the private enforcement side, collaboration offers the advantage of helping private plaintiffs’ attorneys overcome each of the three areas of procedural litigation reform calcified in Supreme Court jurisprudence in the past decade.<sup>295</sup> For areas of public law affected by mandatory arbitration agreements, including employment, consumer, and antitrust claims, private attorneys may no longer be able to litigate at all without joining

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290. See, e.g., Coffee, *Rescuing the Private AG*, *supra* note 6, at 263; Gilles & Friedman, *After Class*, *supra* note 6, at 630–31 (“[B]y leveraging the private bar, the state AGs [bringing parens patriae suits] can recoup vast amounts of money for their citizens and reap commensurate political credit.”); Rubenstein, *supra* note 6, at 2163–64.

291. See, e.g., Coffee, *Rescuing the Private AG*, *supra* note 6, at 263.

292. See *supra* Part II.A.

293. In contrast, outsourcing work to private plaintiff’s attorneys is more common at the state level. See, e.g., Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue.html> [<https://perma.cc/B3FB-SX64>] (documenting that at least nine states’ Attorneys General have hired private plaintiff’s attorneys to litigate some parens patriae lawsuits on behalf of citizens). In addition, private plaintiffs’ attorneys have teamed up with *each other* to respond to their procedural challenges—for example, to file coordinated arbitrations en masse in the face of class action litigation waivers. See, e.g., Jon Steingart, *Class Actions Waived? Workers File Hundreds of Solo Arbitrations*, BLOOMBERG: DAILY LAB. REP. BLOG (Oct. 31, 2017), [https://www.bloomberglaw.com/document/X5FLC604000000?bna\\_news\\_filter=daily-labor-report&jcsearch=BNA%25200000015f6ebcd98ea15f7ebe4f3e0000#jcite](https://www.bloomberglaw.com/document/X5FLC604000000?bna_news_filter=daily-labor-report&jcsearch=BNA%25200000015f6ebcd98ea15f7ebe4f3e0000#jcite) [<https://perma.cc/L5S9-KVKK>].

294. See *infra* Part III.B.

295. See *supra* Part II.A.

forces with a public agency that is not bound by individual private agreements to arbitrate.<sup>296</sup> Likewise, the upfront costs and risk involved in modern class certification procedures may pose too difficult a hurdle for many plaintiffs' attorneys to overcome. As described in Part III, this challenge may be overcome by co-counseling with a public agency not required to comply with Rule 23 to bring systemic cases.<sup>297</sup> And, while pleading requirements under Rule 8, as recently interpreted in *Twombly* and *Iqbal*, would apply equally to complaints filed by public and private attorneys, private attorneys may benefit from the substantial investigatory resources and pre-discovery subpoena power of public agencies, whose access to information at an earlier phase in the case may help ensure surviving a motion to dismiss.<sup>298</sup>

After decades of litigation reform efforts to address fears about profit-motivations in the private attorney general model,<sup>299</sup> there are new concerns that the pendulum has swung too far in the opposite direction, limiting access to the courts for federal statutory claims that rely on private enforcement.<sup>300</sup> In an era of strong and well-funded public agencies, such concerns might have been assuaged by a sense that public enforcers could pick up the slack, stepping in where private enforcers are now constrained.<sup>301</sup> That, however, is not today's reality. Strong deregulatory preferences, exacerbated by corporate campaign financing, in the wake of years of litigation reform stand to wreak havoc on public law enforcement. As scholars have documented,

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296. See Bornstein, *supra* note 28, at 123–25, 146–67; Gilles & Friedman, *After Class*, *supra* note 6, at 630–31, 660, 669; *infra* Part III.A.

297. See Bornstein, *supra* note 28, at 123–25, 146–67; *infra* Part III.A. Gilles and Friedman identified similar advantages in their proposal for increased state parens patriae cases in consumer, employment, and other areas likely to lose private court access due to recent jurisprudence on arbitration and class actions. See Gilles & Friedman, *After Class*, *supra* note 6, at 660 (“[P]arens patriae suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions.”). Again, and beyond the context of parens patriae suits, a co-enforcement approach is unique in that federal enforcement agencies and private attorneys general would collaborate as equal partners, not as principal and agent, making the private bar likely more willing to provide its resources to gain the public agencies' procedural advantages. See *infra* Part III.

298. See Bornstein, *supra* note 28, at 123–25, 146–67; *infra* Part III.A.

299. See *supra* notes 10–11, 39–40, 23, 92, 107 and accompanying text.

300. See *supra* notes 203–05 and accompanying text.

301. Indeed, scholars have called for this. See, e.g., Gilles & Friedman, *After Class*, *supra* note 6, at 630–31; Seiner, *supra* note 118, at 1352–53.

public laws enacted by Congress with hybrid enforcement mechanisms rely on the robust participation of private enforcers,<sup>302</sup> and public agency budgets are designed with the expectation that the private bar will fill an enforcement gap.<sup>303</sup> Each side of a hybrid enforcement scheme is now operating with one hand tied behind its back. From a normative perspective, public-private co-enforcement offers the chance to combine the two remaining hands to ensure one strong, united enforcement presence.

#### D. CHALLENGES FOR THE NORMATIVE CASE

Given current constraints on both halves of hybrid enforcement mechanisms, the normative value of co-enforcement should be apparent to those who value enforcement of federal statutory law. Yet while it offers solutions to existing enforcement challenges, a proposal for co-equal collaborative enforcement must also function in the real world, and has some normative counterarguments.

As raised previously, one major challenge from a theoretical perspective is that public and private enforcers have different, sometimes seemingly conflicting goals.<sup>304</sup> The normative counterpart to this theoretical challenge is that public and private enforcers may have different, sometimes seemingly conflicting *cultures*, too.<sup>305</sup> Public enforcers may necessarily have to operate more slowly, with more hierarchy, bureaucracy, and thrift than private enforcers would like. Private enforcers may, also out of necessity, move more quickly, with less structure and more improvisation than public enforcers would like. Both actors may also have assumptions or perceptions about reputational harm from associating with the other—for example, perceptions that private class action attorneys are out for themselves, that public agencies are inefficient, or that courts prefer one or the other. There is no easy answer to this challenge except that, as described in Part III, through communication, building upon known relationships, and trial and error, enforcement cultures

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302. See *supra* notes 81–84 and accompanying text.

303. See *supra* note 75–80 and accompanying text.

304. See *supra* notes 151–54 and accompanying text.

305. See Bornstein, *supra* note 28, at 171–72; Clopton, *supra* note 6, at 308; Rubenstein, *supra* note 6, at 2137–42.

can blend and co-exist.<sup>306</sup> The significant upside to working through such cultural challenges is that each enforcer offers strengths that helps shore up the other's weaknesses, providing the chance to reach a happy medium on structure, speed, thrift, and reputational perception.

A more difficult cultural obstacle is posed by public agency leadership that is truly hostile to the agency's own mission or duty to enforce regulation—in which case neither public nor private attorneys would likely want to work with the other. This was true to some extent during the Reagan administration,<sup>307</sup> and appears even more so in the current Trump administration.<sup>308</sup> In some cases, this cultural conflict may pose too great an obstacle to overcome. Yet even the agency heads most opposed to regulation may still pursue limited, select enforcement action, creating areas of overlap that provide opportunities for collaboration. For example, even Scott Pruitt—the Trump administration's former Environmental Protection Agency (EPA) administrator who was notorious for opposing the EPA and its regulations<sup>309</sup>—initiated enforcement actions against those who were the very worst violators of environmental laws, Superfund sites.<sup>310</sup> A trend toward deregulation and limited enforcement budgets may be the new norm, but it need not entirely preclude collaboration. Pushing to find areas of overlap where co-enforcement can occur is arguably even more important during deregulatory executive administrations, when resources for public enforcement are at their lowest.

Another normative challenge for co-enforcement is that, where efforts are combined, public and private enforcers will have to give up some amount of their autonomy and resolve any

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306. See also *infra* Part III.B.

307. See, e.g., Burbank & Farhang, *supra* note 6, at 1552–54 (describing Reagan Administration strategy to limit enforcement through “demobiliz[ing] the administrative regulatory enforcement apparatus,” while also limiting “private enforcement”); *supra* notes 231–35 and accompanying text.

308. See, e.g., *supra* notes 264–67 and accompanying text.

309. See *supra* note 266 and accompanying text.

310. See, e.g., *Civil Cases and Settlements*, U.S. EPA, <https://cfpub.epa.gov/enforcement/cases/> [<https://perma.cc/3DL5-J9KL>]. Nevertheless, it is hard to imagine a co-counseling arrangement between an EPA led by Scott Pruitt and a private plaintiffs' firm or public interest firm that practices environmental law.

“turf” issues.<sup>311</sup> Public agencies will likely resist having to share the lead in litigation, but—as left unaddressed by other scholarly proposals<sup>312</sup>—so, too, will experienced private attorneys. Both sides will have to compromise and work out leadership roles which, again, can be an advantage as the division of labor could allow each side to take the lead for certain tasks making better use of resources. Having to work out litigation roles should not pose an insurmountable challenge. The same is required by any one enforcer acting alone, whether public agency team or a private plaintiffs’ firm, any time more than one attorney works on the same matter.

Since a collaborative approach would likely supplement rather than replace parallel hybrid enforcement, both public and private enforcers may also have concerns about being precluded in future separate suits or in strategic follow-on suits.<sup>313</sup> For example, why would a public agency open itself up to future case preclusion by private settlement or arbitration? Again, this may be a benefit rather than a detriment as both enforcers would be involved in the original preclusive suit, so any concerns about its future impact could be resolved up front.<sup>314</sup> Preclusion may not always be bad for enforcers, or be equated with under-enforcement.<sup>315</sup> Certain follow-on suits may benefit from the preclusive effects of having the strongest enforcement cases resolved first.<sup>316</sup> And, while not every individual harmed by an entity that violates public law may be able to recover, the deterrent effect of one strongly prosecuted joint case may do more to encourage legal compliance than many non-preclusive private settlements.

Lastly, if capture or bias is a theoretical concern of co-enforcement,<sup>317</sup> self-interested resource preservation is its normative equivalent. Public and private enforcers, both of whom may perceive themselves to be more resource-constrained,<sup>318</sup> may be

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311. See Bornstein, *supra* note 28, at 171–72; see also *supra* notes 103–04 and accompanying text (discussing lessons from the work of Fine).

312. See, e.g., COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 219–36; Gilles & Friedman, *Exploding the Myth*, *supra* note 6, at 116–17; Rubenstein, *supra* note 6, at 2149–55.

313. See Clopton, *supra* note 6, at 323–24.

314. See *id.* at 319–25.

315. See *id.* at 314–17.

316. See *id.* at 329–30.

317. See *supra* notes 158–62 and accompanying text.

318. See Clopton, *supra* note 6, at 309 (“Scholars have argued about whether

resistant to share their own limited resources with one another. This may be both the biggest hurdle to overcome and the biggest potential advantage to public-private co-enforcement. If public agency and private attorney enforcers develop trust and working collaborative relationships, both stand to gain greatly by leveraging additional resources and skilled person-power.<sup>319</sup> As described further in Part III, co-equal, co-counseled arrangements offer the advantage that each half of the enforcement equation can primarily fund their own activities, without one side taking on a significant financial burden for the other, yet still reaping the benefits of the others' expertise and participation.<sup>320</sup>

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As this Part has shown, considering a move from parallel hybrid enforcement to integrated co-enforcement may now be necessary to ensure appropriate levels of public law enforcement. Integrating public agency and private plaintiff's attorney enforcement efforts in a co-equal fashion on a subset of key public law litigation stands to help overcome the current challenges facing each. Public agencies can gain valuable expertise and needed litigation resources to fill gaps left in the wake of deregulatory political pressures. Private plaintiffs' attorneys can gain essential investigatory resources to ensure "plausible" pleading, and may be able to leap some hurdles posed by mandatory arbitration and class certification. Yet even if a co-enforcement approach is both theoretically sound and normatively necessary, that does not mean it is doctrinally and practically possible. This Article now turns to that task, looking to existing hybrid statutes and related case examples to point the way.

### III. DOCTRINAL & PRACTICAL FRAMEWORK FOR PUBLIC-PRIVATE CO-ENFORCEMENT LITIGATION

Since the rise of federal statutes creating hybrid enforcement schemes in the 1960s,<sup>321</sup> federal public agency attorneys and private plaintiffs' attorneys have been litigating on separate, parallel tracks to enforce many of the same public laws. Yet, as this Part details, there have been moments of overlap and

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public or private enforcers are comparatively more resource constrained, but it seems reasonable to assume that their resources differ . . .").

319. *See id.* at 314–15.

320. *See infra* Part III.B.

321. *See supra* Part I.A.1.

coordination that provide the groundwork for greater collaboration. This Part turns to the challenge of how to accomplish integrated public-private co-enforcement partnerships in practice. It first analyzes any overarching doctrinal challenges to combined enforcement raised by constitutional, statutory, and procedural law. It then provides a conceptual framework for how to create collaboration, drawing on existing examples of intersection between public and private enforcers. This Part is intended to provide an overview that can serve as the basis for future work, tracking specific examples of a public-private co-enforcement litigation model.

#### A. DOCTRINAL FRAMEWORK: CAN WE DO THIS?

Congress has adopted hybrid enforcement schemes in a wide array of federal public law, including environmental, consumer, employment, antitrust, and securities protections. The specific legal steps required to pursue a co-enforcement approach will require looking to the specific context—to each federal statute and the authority of its enforcement agency. Yet doctrinal challenges to co-enforcement are likely to fall into three main areas of concern: constitutional considerations, statutory hurdles, and procedural constraints. This Section considers the overarching issues arising in each.

##### 1. Constitutional Doctrine

Considered broadly, the U.S. Constitution poses no obvious obstacles to collaborative public-private enforcement litigation. Co-enforcement would combine the efforts of private actors and federal agencies both already authorized by Congress to enforce federal statutes. Thus, it does not implicate separation of powers doctrine, which requires independent authority of each of the three branches of government under Articles I through III of the U.S. Constitution.<sup>322</sup> Article II has been interpreted to vest enforcement power for federal law with the executive branch.<sup>323</sup> Yet where Congress enacts a statute that creates a hybrid enforcement scheme through litigation by both a federal agency controlled by the executive branch and a private right of action to individuals, either of which has discretion to litigate cases before the judiciary, no one branch's power has been usurped by

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322. See Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1433–39.

323. See *id.*

another.<sup>324</sup> To the extent that these issues have already been resolved in the context of statutes that authorize private attorneys general or citizen suits, the same precedent applies.<sup>325</sup> Simply combining two types of properly vested enforcement authority does not change this analysis.<sup>326</sup>

It is true that, in a collaborative regime, both public and private enforcers would be co-equal, and the public enforcer would not be able to quash or totally control the lawsuit.<sup>327</sup> Co-enforcement as envisioned by this Article, however, would neither compel a public enforcer to join a case it did not wish to pursue, nor to pursue a case in a fashion with which it disagreed. Because the federal agency could either decline to pursue a case collaboratively at the outset or withdraw its representation, should some insurmountable dispute arise with private attorney co-counsel over how to pursue the case, the agency would maintain its independence.<sup>328</sup>

Co-enforcement arrangements also raise no issues with constitutional standing. The federal statutes to which this Article's proposal applies already vest enforcement authority in both a

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324. *See id.* at 1434–35 (citing and applying cases to her proposal to deputize private citizens to bring federal civil rights cases).

325. *See id.* at 1433–39.

326. Any perceived conflict here would relate to issues of capture, bias, or conflict of interest, which are theoretical and normative problems, not constitutional ones. *See supra* notes 158–62 and accompanying text.

327. This stands in contrast to Gilles's proposal of delegating authority for private attorney civil rights suits, in which she noted: "Private enforcement regimes are vulnerable to separation of powers challenges where the executive does not retain sufficient control over the processes of initiating, conducting, and terminating litigation. The deputation model . . . provides for genuine executive 'control' . . . through . . . executive power to quash a private . . . suit at any stage." Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1438–39. It also stands in contrast to Gilles & Friedman's proposal of *parens patriae* suits by state AGs using private attorneys, in which the authors explained that, politics aside, "there is little to stop state AGs from engaging private law firms on a contingent fee basis to pursue claims in *parens patriae* on behalf of injured state residents," so long as the attorneys general retain "total control over all key decision making . . ." Gilles & Friedman, *After Class*, *supra* note 6, at 669.

328. Because the parties maintain co-equal authority and the private enforcers would not gain "deputized" power through the executive agency, but rather maintain it through Congressional enactment, there are also no concerns raised by Article II's Appointments Clause. Compare the private attorney as agent model of Gilles, *Reinventing Structural Reform*, *supra* note 6, at 1442–49.



federal agency created by the statute and in citizen plaintiffs empowered through a private right of action.<sup>329</sup> As required by Supreme Court interpretation of Article III, a private attorney general must demonstrate its interest in enforcing the law through its own injury-in-fact.<sup>330</sup> As proposed, a co-enforcement scheme would focus on combining the efforts of federal agencies created to enforce statutes with those of private plaintiffs enforcing statutory private rights of action to redress their own injuries—meaning that each half of the collaborative team would have its own independent ground for standing.

## 2. Statutory Doctrine

Beyond constitutional concerns, a second doctrinal challenge may be any specific barriers to co-enforcement arrangements contained in the text or interpretation of the relevant federal statute. While a complete analysis of any particular arrangement would require a deeper, statute-specific analysis, some general principles apply.

For many federal statutes in which Congress has created a hybrid enforcement scheme of federal agency and private right of action, it has also authorized intervention by one enforcer in a case brought by the other,<sup>331</sup> laying the foundation for collaboration. For example, Title VII of the Civil Rights Act of 1964 allows

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329. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (2012) (“[T]he [Equal Employment Opportunity] Commission may bring a civil action against any respondent . . . [I]f within [the relevant time period] . . . the Commission has not filed a civil action . . . a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved or . . . if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.”).

330. See, e.g., Clopton, *supra* note 6, at 316 n.199 (noting that “citizen-suit plaintiffs must show an ‘injury in fact’ to have standing” (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572–78 (1992))); Rubenstein, *supra* note 6, at 2145 (noting that, for example, “environmental citizen-suit plaintiffs must show their own personal interest in a matter prior to filing suit in federal courts,” making them “those who enforce public policy by pursuing their own interests,” while “a qui tam relator . . . ha[s] standing derivative of the government’s standing, an assignee of the government’s interests”). Qui tam suits are beyond the scope of this Article’s proposal.

331. See, e.g., False Claims Act, 31 U.S.C. § 3730(b)(2) (2012); 47 U.S.C. § 402 (2012) (FCC decision judicial review); see also Clopton, *supra* note 6, at 329 & n.278–79 (providing examples of public intervention in private cases and

individual plaintiffs to intervene in an enforcement action brought by the U.S. Equal Employment Opportunity Commission (EEOC) on their behalf, and it allows the EEOC to intervene in a case brought privately by plaintiffs.<sup>332</sup> After intervention, both enforcers continue on in the litigation on behalf of the named plaintiffs.<sup>333</sup> Likewise, while the Clean Water Act requires a private plaintiff to provide notice to the EPA before filing a citizen suit and bars private suits for injuries that the EPA is “diligently prosecuting,” the Act also allows “any citizen [to] intervene as a matter of right” in such a suit.<sup>334</sup> For these and similar statutes, current law permits joint enforcement. If one enforcer may intervene after the lawsuit is filed by the other, there is nothing in the statute that should prevent joint enforcement from the outset by creating a co-counseling arrangement and filing the case together.<sup>335</sup>

For other statutes, however, when the government agency intervenes in a private plaintiff’s lawsuit, it displaces the authority of the private plaintiff. For example, private plaintiffs may file lawsuits for violations of the federal Fair Labor Standards Act without first filing charges with the U.S. Department of Labor (DOL).<sup>336</sup> If, however, they do file a charge and the DOL

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vice versa and noting that “courts have various capabilities that can improve coordination between seemingly separate proceedings”).

332. 42 U.S.C. § 2000e-5(f)(1) (2012) (“[T]he Commission may bring a civil action against any respondent . . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . [A] civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved or . . . if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice . . . . [T]he court may . . . permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance.”).

333. See, e.g., Bornstein, *supra* note 28, at 160–62 (discussing the examples of *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 673 (5th Cir. 1985); *United Telecomms., Inc. v. Saffels*, 741 F.2d 312, 313–14 (10th Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985)).

334. Clean Water Act, 33 U.S.C. § 1365(b) (2012); see also Clopton, *supra* note 6, at 305.

335. See *infra* Part III.B.

336. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 216–217 (2012); see also U.S. DEPT OF LABOR, WAGE & HOUR DIV., FACT SHEET #44: VISITS TO EMPLOYERS (2015), <https://www.dol.gov/whd/regs/compliance/whdfs44.pdf> [<https://perma.cc/2P7X-T7LQ>].

decides to intervene, the agency takes over the case on the plaintiff's behalf, replacing private counsel.<sup>337</sup> Similarly, private plaintiffs may file a lawsuit under the Telemarketing and Consumer Fraud and Abuse Prevention Act seeking civil damages against a fraudulent telemarketer or an injunction to enforce compliance with federal law, but must notify the Federal Trade Commission (FTC) that it has done so, at which point the FTC may intervene.<sup>338</sup> However, when the FTC or Bureau of Consumer Financial Protection files such a lawsuit, private plaintiffs may not institute a suit of their own against the same defendant for the same violation.<sup>339</sup> For statutes like these, a truly collaborative arrangement may not be possible without first amending the rule or reinterpreting the precedent that requires plaintiff displacement. Where changing existing rules remains impossible, public and private enforcers could still collaborate through an arrangement in which the agency hires and delegates its authority to private attorneys, as other scholars have proposed.<sup>340</sup>

### 3. Procedural Doctrine

A final overarching doctrinal concern for co-enforcement is whether the procedural constraints on private enforcement raised in Part II could somehow nullify the procedural advantages gained by partnering with public enforcers.<sup>341</sup> As raised previously, private enforcement efforts have been dramatically hampered by recent Supreme Court precedent intensifying

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337. 29 U.S.C. §§ 216–217; *see also* U.S. DEP'T OF LABOR, *supra* note 336.

338. Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6104(a)–(b) (2012); *see also* Clopton, *supra* note 6, at 304 n.129.

339. 15 U.S.C. § 6104(c). The same holds true for state attorneys general who bring *parens patriae* suits on behalf of their citizens for telemarketing fraud. *See* 15 U.S.C. § 6103 (2012).

340. *See generally* Coffee, *Rescuing the Private AG*, *supra* note 6 (discussing antitrust and securities cases), Gilles, *Reinventing Structural Reform*, *supra* note 6 (private civil rights cases); Gilles & Friedman, *After Class*, *supra* note 6, at 668–70 (state *parens patriae* cases); Rubenstein, *supra* note 6 (same).

341. *See supra* Part II.A. Gilles & Friedman raised similar concerns when proposing state *parens patriae* actions to overcome compelled individual arbitration. *See* Gilles & Friedman, *After Class*, *supra* note 6, at 664–68 (“To what extent do the challenges that have hobbled class actions pose a threat to *parens patriae* actions? . . . As enforceable class action waivers proliferate, we think it is only a matter of time until a defendant makes the argument that a state AG’s *parens patriae* action is barred by the uniform terms of the contracts between the defendant and the AG’s constituent consumers and workers.”).

pleading standards, limiting class actions, and increasingly compelling arbitration.<sup>342</sup> If public enforcers are not, themselves, subject to the same limitations, could they become so by co-counseling with private enforcers?

First, recent pleading requirements established by the *Twombly* and *Iqbal* interpretations of Rule 8 pose no doctrinal obstacle to co-enforcement arrangements because pleading standards are the same whether the lawsuit is filed by a public agency or a private attorney.<sup>343</sup> This means that, regardless of whether a public or a private enforcer files the complaint, the complaint itself must now meet the “plausible” pleading standard.<sup>344</sup> Thus, there is no risk that co-counseling with private attorneys should impact a public agency’s ability to meet current pleading requirements, or vice versa. In fact, as suggested previously, a collaborative approach may be better than a traditional parallel enforcement approach when it comes to meeting more rigorous pleading requirements.<sup>345</sup> Combining private attorneys’ outside information with public agencies’ pre-litigation investigatory authority will likely improve upon each enforcer’s current ability to survive a motion to dismiss for failure to state a claim under *Twombly* and *Iqbal*.<sup>346</sup>

Second, while class action doctrine’s constraints on private attorneys do not apply to public agencies, existing intervention rules make it possible for public and private enforcers to work together on group-based claims without jeopardizing the public agency’s procedural advantage. Because private attorneys seeking to pursue class claims must comply with Federal Rule of Civil Procedure 23, they are directly affected by litigation reform efforts and jurisprudence raising evidentiary standards and making it more difficult to certify a class.<sup>347</sup> Federal agencies seeking to pursue group or “systemic” claims, however, do not have to

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342. See *supra* Part II.A.

343. See *supra* Part II.A.

344. See *supra* Part II.A.

345. See *supra* Part II.C.

346. See *supra* Part II.C. The one caveat is that, under *Iqbal*, judges have been authorized and encouraged to use their own “judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). This allows a slight opening for public enforcers to be disadvantaged by partnering with private enforcers if a given judge bears animosity toward private class action attorneys, but that is not a doctrinal hurdle, per se.

347. See *supra* Part II.A.3.

comply with Rule 23. Their statutory enforcement authority allows them to litigate harms on behalf of the public interest without class certification.<sup>348</sup> Certainly, private plaintiffs' attorneys could not seek to, themselves, represent a class and simply evade Rule 23 requirements by co-counseling with a public agency. But, under existing procedures that allow private citizens to intervene in public agency enforcement litigation, a private attorney who represents one or more affected *individuals* could team up with a public agency who represents the *public* in a case to redress the same harm on a group-wide basis.<sup>349</sup> So long as the private attorney focuses on and seeks compensation for representation of their individual clients only, the public and private attorneys should be able to work together to develop legal theories and litigate the case jointly. Thus, pursuing group-based claims together may pose a practical challenge for co-enforcers, but not necessarily a doctrinal one.

The third area of private procedural constraint—jurisprudence upholding mandatory pre-dispute arbitration agreements—poses a more complicated challenge for co-enforcement arrangements. As with Rule 23, while private parties may be compelled to subject their individual claims to arbitration, federal agencies seeking to pursue the same claims are not similarly affected. Even when a business requires its employees, consumers, or others to waive their rights to bring a lawsuit and agree to submit any legal claims to arbitration, a federal agency that enforces those same rights cannot be so limited because the agency was not a party to the arbitration agreement.<sup>350</sup>

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348. See, e.g., *Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 320 (1980) (holding that the EEOC did not have to comply with Rule 23 to bring its own systemic litigation); see also Bornstein, *supra* note 28, at 154, 160–63; Gilles & Friedman, *After Class*, *supra* note 6, at 665 (“Absent a radical expansion of current doctrine, parens patriae suits are likewise imperious to the increasingly restrictive rules governing class certification.”); cf. *id.* at 668 (“One place where AGs *do* have to make a Rule 23 showing is where the parties wish to endow their settlement with the res judicata reach of a class action settlement.”).

349. See *supra* notes 331–35 and accompanying text.

350. See, e.g., *Equal Emp't Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 288–90, 298 (2002) (holding that an employer-employee agreement to arbitrate employment-related disputes does not bar the EEOC from seeking judicial relief); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (noting that arbitration agreements do not preclude the EEOC from bringing class-wide suits); see also Bornstein, *supra* note 28, at 154, 158–60; cf. Gilles & Friedman, *After Class*, *supra* note 6, at 664–65 (“Facing parens patriae claims

For example, the EEOC is not barred from pursuing employment discrimination claims on behalf of an employee who files a charge with the agency, even if the employee signed a mandatory pre-dispute arbitration agreement.<sup>351</sup> In 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*, the first Supreme Court case to hold that discrimination claims could be subject to mandatory arbitration, the Court also held that this did not stop employees from filing charges with the EEOC.<sup>352</sup> Because “the EEOC’s role in combating . . . discrimination is not dependent on the filing of a charge . . . and it has independent authority to investigate . . . discrimination[,] . . . arbitration agreements [do] not preclude the EEOC from bringing actions seeking class-wide and equitable relief.”<sup>353</sup> A decade later, in *EEOC v. Waffle House*, the Court clarified that, when an employee signed an arbitration agreement as a condition of getting hired, it did not prevent the EEOC from pursuing a discrimination case on his behalf, even though he was not an official party to the lawsuit.<sup>354</sup> The arbitration clause neither “materially change[d] the EEOC’s statutory function” nor “place[d] any restriction on a nonparty’s choice of a judicial forum.”<sup>355</sup> Once a charge is filed, the EEOC becomes “the master of its own case,” able to seek even victim-specific relief for the non-party who filed the charge where it serves a public deterrent purpose: an employer cannot “turn[] what is effectively a forum selection clause into a waiver of [the EEOC’s] statutory remedies.”<sup>356</sup>

While this means that a public enforcer can pursue litigation on behalf of groups and even individuals who are, themselves, bound by arbitration agreements not to litigate, it does

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that might otherwise have been brought by persons that are bound by arbitration clauses and class action waivers, defendants will argue that agency principles apply, under which an agent is deemed bound by the arbitration agreements of the principal. But the . . . whole idea behind *parens patriae* suits is that the state has its own interest at stake in the litigation . . . [which] kicks in once a sufficient number of its constituents have suffered injury . . . [C]lass waivers, in our view, are unlikely to affect *parens patriae* suits.” (footnotes omitted).

351. See *Waffle House*, 534 U.S. 279; *Gilmer*, 500 U.S. 20; see also Bornstein, *supra* note 28, at 154, 158–60.

352. *Gilmer*, 500 U.S. at 20, 23–29.

353. *Id.* at 28, 32 (emphasis omitted).

354. *Waffle House*, 534 U.S. at 282–86.

355. *Id.* at 288–89.

356. *Id.* at 291–92, 294–95, 298.

foreclose the option of private attorney intervention. In the context of the EEOC, courts have held that any individual plaintiff intervenor in an agency action who is covered by a mandatory arbitration agreement may be compelled to arbitrate any individual cross-claim against the employer.<sup>357</sup> For these and other areas of hybrid enforcement in which parties may use mandatory arbitration agreements,<sup>358</sup> true enforcement integration may not be possible. Coordination is important, however, as clients required to arbitrate may seek out private attorneys, who—if they believe the case to be of significant public interest—may wish to refer the case to the agency to allow for litigation. In these instances, too, a deputization model, as other scholars have proposed, may still offer a means for collaboration.<sup>359</sup>

Given the rise of arbitration agreements in certain areas of public law, creating a system that encourages communication and, where possible, collaboration between public and private enforcers is essential to ensuring *any* adequate level of enforcement. Otherwise, those forced to arbitrate their statutory claims individually may simply give up.

#### B. PRACTICAL FRAMEWORK: HOW DO WE DO THIS?

Assuming that all doctrinal hurdles can be overcome so that a co-enforcement arrangement is possible as a matter of law, the final question is how to implement it in practice. This Section suggests that, while achieving a co-equal collaborative public-private model of enforcement will require a cultural shift among enforcers that should not be underestimated, it is otherwise a simple endeavor as a matter of practice. If public agency and private plaintiffs' attorneys are willing to try to bridge the divide, a co-enforcement arrangement can be created and managed, for

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357. See Bornstein, *supra* note 28, at 160 n.238 (citing *Equal Emp't Opportunity Comm'n v. Woodmen of World Life Ins. Soc'y*, 479 F.3d 561, 568–70, 568 n.2 (8th Cir. 2007)).

358. Note that, while arbitration agreements are common in employment, consumer, and banking contexts, there are many areas of hybrid enforcement in which this doctrinal hurdle will not arise, posing no obstacle to public-private co-enforcement—including the environment, housing, education, securities, and more.

359. See generally Coffee, *Rescuing the Private AG*, *supra* note 6 (antitrust and securities cases); Gilles, *Reinventing Structural Reform*, *supra* note 6 (private civil rights cases); Gilles & Friedman, *After Class*, *supra* note 6, at 668–70 (state *parens patriae* cases); Rubenstein, *supra* note 6 (antitrust and securities cases).

the most part, by a well-planned co-counseling agreement and open communication. This Section provides a framework for how to build a collaborative model, considering four practical areas: forming a co-enforcement team, dividing up work, resolving conflicts, and financing the litigation. Because the specifics of any co-enforcement litigation model will depend on the statute and agency involved, this Section aims to lay the groundwork upon which future work examining specific co-enforcement litigation may be built.

### 1. Forming a Public-Private Co-Enforcement Team

A proposal for integrated enforcement is not designed to replace separate parallel hybrid enforcement, but, instead, to supplement it at a time of unprecedented constraints on both enforcers. For this reason, co-enforcement arrangements could be entered into selectively for cases that most warrant a collaborative approach. Public agencies could develop an assessment tool to determine in which types of cases to seek private co-counsel based on relevant criteria—for example, cases the agency estimates will require over a certain amount of financial resources or for which there are known individual victims with private standing. All federal public agencies currently face far greater demand for enforcement than their resources can cover, so they already engage in case evaluation to select which of those cases to litigate.<sup>360</sup> Each agency could decide on additional criteria that triggers them to seek private co-counsel and add this to their existing rubric.

Likewise, private attorneys usually engage in routinized case intake to assess whether to accept a plaintiff's case.<sup>361</sup> Each firm could identify and add to their existing intake and decision-making process criteria for when to approach the relevant agency to co-counsel—for example, when pre-litigation investigation or class certification poses a difficult challenge, or when a suit warrants litigation but individual plaintiffs are covered by

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360. See, e.g., U.S. SEC. & EXCH. COMM'N, OFFICE OF CHIEF COUNSEL, ENFORCEMENT MANUAL 5 (2017); U.S. DEPT OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL ch. III, at 7 (5th ed. 2012) <https://www.justice.gov/atr/file/761141/download> [<https://perma.cc/J2TG-YZVR>] (last updated Apr. 2018); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SYSTEMIC TASK FORCE REPORT 18 (2006).

361. See, e.g., *Will a Lawyer Take My Case?*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/takecase> [<https://perma.cc/ZM3Z-CNHB>].



mandatory arbitration agreements.<sup>362</sup> Moreover, because many federal statutes with hybrid enforcement schemes allow the other enforcement entity to intervene,<sup>363</sup> public agencies and private attorneys could draw on their existing processes for determining whether to intervene when deciding whether to co-counsel, but do so before the complaint is filed—in effect “pre”-intervening.

Once co-enforcement case criteria are established, either public or private enforcement attorneys could broach the idea of creating a collaborative team for a particular case based on existing relationships. In addition, or instead, public enforcers could reach out to the relevant private bar to establish a panel of private attorneys with whom they could seek to regularly co-counsel. Neither option would require reinventing the wheel; in many areas of federal statutory enforcement, there are a limited set of national nonprofit public interest organizations and private law firms that handle a significant portion of enforcement meant to serve the public interest.<sup>364</sup> Establishing a set group of co-counsels would also reduce transaction costs of co-enforcement over time, given that once a co-counseling agreement is created, the parties involved may more easily replicate it for future cases.

Of course, any process for how an agency selects co-counsel would need to be transparent and ensure against favoritism to avoid “pay-to-play” concerns raised by other scholars’ proposals for deputization schemes.<sup>365</sup> But because each half of a co-equal

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362. See *supra* notes 348–56 and accompanying text.

363. See *supra* notes 331–35 and accompanying text.

364. See, e.g., *Rankings: Most Feared Plaintiffs Firms*, LAW360, <https://www.law360.com/rankings/most-feared-plaintiffs-firms> [<https://perma.cc/LH29-RFG2>]; *The Top 50 of 2018*, ISS, <https://www.issgovernance.com/library/the-top-50-of-2018/> [<https://perma.cc/75L2-KLU4>]; *Public Interest Law Firms*, YALE LAW SCHOOL, <https://law.yale.edu/student-life/career-development/students/career-guides-advice/public-interest-law-firms> [<https://perma.cc/32YS-CAQ3>]; *Private Public Interest and Plaintiff's Firm Guide*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/dept/opia/private-public-interest-law-and-plaintiffs-firm-guide/> [<https://perma.cc/4QC3-LSUK>].

365. See *supra* Part II.C; see also Gilles & Friedman, *After Class*, *supra* note 6, at 670–71 (applying a similar rationale to their suggestion of more State AG parens patriae cases, with outsourcing to private attorneys: “The public-private partnership model, properly implemented, has the potential to replace th[e] unseemly scrum [of private law firms vying for lead counsel position] with a transparent process, in which the AGs select their cocounsel in conformity with whatever state laws and practices might exist governing state contracting . . . [and]

co-enforcement team would be responsible for generating its own funding, this would be a less onerous burden. While critics could still raise concerns that agencies are directing business to certain private co-counsel, there would be no public funds going to those attorneys.<sup>366</sup>

## 2. Dividing Work

Once a public-private team is formed, and assuming there is no specific statutory bar to a co-equal relationship, most other issues can be resolved by a clear and detailed co-counseling agreement. Indeed, as documented in recent legal scholarship, the judiciary is increasingly accepting of and deferential to privately arranged procedure.<sup>367</sup> Unless a relevant statute imposes a barrier, how co-counsel divides work can be a matter of private contract.

Again, creating a co-enforcement co-counseling agreement should not require starting from scratch: enforcers could look to existing models and arrangements they already use when working with other attorneys. For example, many, if not most, complex private class actions are brought by multiple plaintiffs' attorneys or firms working together, sometimes with the pro bono department of a defense or corporate firm.<sup>368</sup> Such arrangements already contemplate things like whether there will be a lead counsel, which firms or attorneys are responsible for which case duties, responsibilities of each to include the other in strategic decisions, and so on.<sup>369</sup> Likewise, many federal agencies engage in agreements with other state or federal agencies with whom they share overlapping enforcement authority. For example the EEOC establishes a work-sharing agreement with each state

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act[] as a filter . . . against unmeritorious cases on which private lawyers might otherwise [pursue] in order to exploit *in terrorem* effects.”).

366. See *infra* Part III.B.4.

367. See, e.g., Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 128–39 (2018).

368. For example, in the *Dukes v. Wal-Mart Stores, Inc.* class action lawsuit alleging sex discrimination under federal Title VII of the Civil Rights Act of 1964, fifteen different attorneys from five different law firms and four non-profit organizations were listed as counsel of record for plaintiffs. See Brief for Respondents, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (No. 10-277), 2011 WL 686407.

369. See, e.g., *Model Co-Counseling Agreements*, ASS'N OF PRO BONO COUNSEL (Jan. 21, 2015), <https://apbco.org/model-co-counseling-agreements/> [<https://perma.cc/VX3X-QALJ>].

Fair Employment Practices Agency that enforces antidiscrimination law.<sup>370</sup> And the Antitrust Division of the U.S. Department of Justice has established procedures for how to work jointly and cooperatively with other public agencies with whom their responsibilities overlap, including both the FTC and the antitrust divisions of state attorneys general.<sup>371</sup>

By starting with existing co-counseling or work-sharing agreements and negotiating any additional issues at the outset, public and private enforcers can likely resolve how to divide responsibilities, as well as establish a process for making any future decisions throughout joint litigation.<sup>372</sup>

### 3. Resolving Conflicts

Similarly, collaborative enforcement teams could work to anticipate and resolve up front any likely sources of conflict that may arise. Existing co-counsel agreements each enforcer uses with other attorneys or agencies likely also provide examples of resolutions to known conflicts. For example, model co-counseling agreements from the Association of Pro Bono Counsel include clauses addressing issues that could lead co-counsel to clash, such as priorities related to settlement, liability for any sanctions imposed, and contact with the media.<sup>373</sup> More importantly, the co-counseling agreement could establish procedures for resolving any conflicts that may arise in the future—for example, submitting any unresolved conflict to mediation or arbitration, or agreeing to abide by a named plaintiff/client's decision.<sup>374</sup>

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370. See, e.g., *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/fepa.cfm> [<https://perma.cc/RCR4-7BFX>]; *FY 2012 EEOC/FEPA Model Work-sharing Agreement*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/employees/fepa\\_wsa\\_2012.cfm](https://www.eeoc.gov/employees/fepa_wsa_2012.cfm) [<https://perma.cc/BEU9-LSFR>].

371. U.S. DEPT OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION MANUAL ch. VII, at 3–29 (5th ed. Nov. 2012), <https://www.justice.gov/atr/file/761161/download> [<https://perma.cc/C8U6-4YU8>].

372. Enforcement does not have to mean litigation, but mediated settlements or arbitration should have a class/systemic component or injunctive relief that the presence of the public agency can ensure post-*Concepcion*. For a discussion of how federal agencies are responding to mandatory arbitration, see generally Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991 (2017).

373. See, e.g., *Model Co-Counseling Agreements*, *supra* note 369.

374. See, e.g., *id.*

Another potential conflict involves ethical duties to each enforcer's "client"—a challenge that, once resolved, may in fact be a strength of co-equal, collaborative enforcement. In a co-enforcement arrangement, the private plaintiffs' attorney will be duty-bound first to the individual named client or clients who brought the case, while the public agency will be first responsible to the public interest. Once again, this is nothing new to experienced attorneys, who must strike similar balances often, for example, when two attorneys represent multiple parties in the same case, or even when a single attorney faces a settlement offer that will cover their costs or achieve their goals but fall short of the client's desires.

For many, if not most, cases, particularly those pursued as a class action or systemic litigation, these interests will largely overlap. The individual plaintiff's interests may be best served by both a damage award and injunctive relief to correct and deter future harm by the defendant; the public's interests are represented by the individual plaintiff, who is a member of the injured public. Both public and private enforcers play a role in both compensation and deterrence.<sup>375</sup> And it is exactly where individual victim interests and the larger public interests diverge, that co-enforcement may offer its greatest reward. To the extent that private enforcement of public law has been subject to the criticism that it creates "agency costs,"<sup>376</sup> the ethical duties of public enforcer co-counsel can provide a check on private attorney "entrepreneurialism," to ensure that enforcement is truly serving both harmed individuals and the public to which they belong.

#### 4. Financing Litigation

The final and most complicated element of putting co-enforcement arrangements into practice is how to finance the litigation. Generally speaking, public enforcement litigation is funded through the federal agency's budget, with the focus of the recovery being injunctive relief and damages that go to the injured public, whereas private plaintiffs' attorneys fund their litigation through a combination of attorneys' fees allowed by statute and contingency fees for a portion of plaintiffs' damages

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375. See *supra* notes 76–80, 154–57 and accompanying text.

376. See *supra* notes 90–94 and accompanying text.

award.<sup>377</sup> Yet this is not always the case. Some federal statutes allow public agencies to seek reimbursement through fines, fees, or a portion of damages recovered, too.<sup>378</sup> Funding arrangements for co-enforcement litigation would have to be statute-specific, made in accordance with any statutory requirements limiting litigation damages to the public agency. That said, so long as all attorney time is tracked and all monies collected and distributed according to the law, there is nothing to stop each enforcer from seeking reimbursement for the portion of work they did on the case in the manner in which they usually do so.

Should a statute forbid public agency collection of attorneys' fees, co-enforcement provides a significant advantage over other proposals for agency oversight of private attorneys general<sup>379</sup>: because the enforcers act as co-equal co-counsel, the private attorney is not acting as the "agent" of the "principal" public agency, so should not be limited from seeking attorneys' fees for its own documented work.

Once determined up front, any financing arrangement, too, could be clarified and enforced through a co-counseling agreement. For example, both enforcers could agree to cover their own costs and expenses incurred for their portion of work on the case and could detail a method of recordkeeping for attorney work hours.<sup>380</sup> Each could then use those records to access financing in their usual fashion: the agency incurring costs and fees allowed by their budget, private attorneys seeking attorneys' fees for their portion from the court should they prevail in the litigation. Both parties would be responsible for financing their own portion of work just as they do when multiple private firms co-counsel, more than one public agency enforces the same case, or a private party intervenes in a federal agency action or vice versa.

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From a doctrinal standpoint, the Constitution and most hybrid statutes, themselves, pose no constraints to co-enforcement,

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377. See Clopton, *supra* note 6, at 309 (noting that "some funding mechanisms (e.g., alternative litigation financing and contingency fees) are not equally available to public and private parties").

378. See generally *id.* at 309 n.158.

379. See generally COFFEE, ENTREPRENEURIAL LITIGATION, *supra* note 6, at 219–36; Gilles, *Reinventing Structural Reform*, *supra* note 6; Gilles & Friedman, *After Class*, *supra* note 6, at 623; Rubenstein, *supra* note 6, at 2129.

380. See, e.g., *Model Co-Counseling Agreements*, *supra* note 369.

and collaboration may be possible despite recent procedural jurisprudence. From a practical standpoint, processes for case selection, division of labor, and litigation financing can likely be developed from existing tools through co-counseling agreements. The biggest challenge to implementing co-enforcement, then, is overcoming professional cultures to build trust and collaboration between public agency and private plaintiffs' attorneys who, despite working *on the same side* of civil law enforcement, may have reservations about each other's motivations or practices. This is no small challenge, but it is also not insurmountable. Private law firms have long co-counseled with one another; state and federal government agencies collaborate when their enforcement authority overlaps; and many public and private enforcers are permitted to intervene in each other's cases. There are existing models from which to draw guidance on how to integrate efforts, and, once public and private enforcers establish one collaborative co-equal partnership, they should be able to replicate it. Most importantly, given their current limitations, public and private enforcers may no longer have a choice but to work together, to ensure that the federal rights they both seek to protect are adequately enforced.

### CONCLUSION

The efforts of both halves of what Congress intended to be two-pronged, overlapping enforcement regimes for federal public laws have now become seriously constrained. In a series of procedural decisions over the past decade, the U.S. Supreme Court has limited the ability of private plaintiffs' attorneys to pursue class actions and, indeed, the very access to federal courts they need to pursue enforcement litigation.<sup>381</sup> During the same time period, an economic crisis launched a fervent political movement asserting new pressure to reduce public agency enforcement, exacerbated by recent U.S. Supreme Court decisions unlocking unlimited campaign contributions by those subject to regulation.<sup>382</sup> The time is ripe for public and private attorney enforcers to consider combining forces.

Other scholars have proposed creating greater oversight by public agencies acting as "principals" who delegate or outsource the work of enforcement litigation to private attorney "agents,"

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381. See *supra* Part II.A.

382. See *supra* Part II.B.

either to ensure access to the courts, or to curb the profit motivations of private attorneys.<sup>383</sup> Yet this is an arrangement that may not appeal to private plaintiffs' attorneys, many of whom have a deep commitment to the public interest and significant litigation expertise and successes. Moreover, this "deputization" model would require a level of resources and capacity for oversight that public agencies now lack.

A public-private co-enforcement approach, in which private attorneys and public agencies share leadership and resources co-equally, would combine each enforcer's procedural and practical advantages while balancing their cultures and motivations.<sup>384</sup> A proposal to adopt co-enforcement is not intended to supplant the current model of separate, parallel enforcement. Instead, it is offered to supplement and enhance existing hybrid regimes for significant cases, to bolster the efforts of each enforcer currently acting alone.

A collaborative, co-enforcement approach is not a panacea. It will not resolve entirely a lack of federal agency support or resources, nor will it reopen the courthouse doors that have now been closed to private plaintiffs. And it will require enforcers to rethink how they have done things in the past, to overcome existing cultural norms, and to share leadership over certain cases. But, in an era of both shrinking private access to federal courts and intense political and economic pressure away from public regulation, public-private co-enforcement litigation may now be a necessity.

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383. See *supra* notes 107–17 and accompanying text.

384. See *supra* Parts I.B, II.C.